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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S BRIEF

In Opposition to Appellees' Motion to Dismiss or Affirm.

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CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.*

I. APPELLEES' MOTION SPREADS OBSCURANTISM DESPITE AN ILLUMINATING RECORD.

Appellees (the railroads) state at their page 20 that the public interest in this case is "without documentation" and "greatly exaggerated." Further documentation is set forth in Appendices A and B at i, lv *infra* and

* Emphasis is added throughout this brief unless otherwise stated.

in certain footnotes.[1] Matching this imperviousness is the railroads' refusal to acknowledge the applicability of the Fourteenth Amendment to the supreme court judgments below. Since Appellant seeks plenary consideration by this Court of questions touching discrimination in property taxation, the recalcitrance is noteworthy in view of pronounced railroad protestation during the past six years about property tax discrimination. See, *e.g.*, Map #3, Appendix B, at v *infra*. The questions presented involve whether the Fourteenth Amendment precludes state action which arbitrarily and discriminatively shifts the property tax burden from railroad property to non-railroad property. The comprehensive record in this case affords microcosmic insight into burgeoning and unconscionable use by railroads of the Judiciary in constitutional litigation involving mandates of property tax uniformity and equal protection. Appendices A, B at i, v *infra*. The railroads have been starting litigation and relying on inadequate records which deny the Judiciary the facts and perspective requisite to sound decision. Typical are the records in the twin primordial decisions of *People ex rel. Hillison v. CB&Q*, and *People ex rel. Kohorst v. GM&O*, and *C&NW*, 22 Ill. 2d 88, 104 (1961), which are peculiarly connected with national developments. See note, Map #3, Appendix B at v *infra*. The inadequacy of the records in these two cases is reflected in the court's opinions.[2]

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[1] See, *e.g.*, n. 8 at 7 *infra*; n. 10 at 11 *infra*; n. 12 at 14 *infra*; n. 17 at 17 *infra*; n. 21 at 33 *infra*; n. 22 at 35 *infra*.

[2] *E.g.*, "Plaintiff [the People] offered no evidence to contradict any of these studies [assessment-sales ratio studies] or the other evidence presented by defendant [railroad] showing the assessment level [of locally assessed property]." 22 Ill. 2d 88, 97. ". . . There may have been factors which justify the Department in its action. If there were, it should have been able to articulate them with a sufficient degree of intelligibility to enable a court to deter-

Appellees resist plenary consideration of unusual state supreme court interference with the administration of the property tax system. This interference, commenced in 1961, not only finds discrimination against railroad property, but also determines the amount of the discrimination. The interference has disrupted the work of successive tax chiefs appointed by successive constitutional officers, the Governors of Illinois.[3] Occurring in Illinois,

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mine whether such action by the Department had a reasonable basis or was completely arbitrary. This the plaintiff has made no attempt to do." *Id.* at 101. At 99, the court referred to "the absence of evidence to the contrary," and at 109, anent railroad property assessment, "There is no evidence in the record to overcome. . . ." Faced with barren records regarding background actions of the Directors of Revenue and related data the court resorted to utilization of presumptions of statutory compliance by the Directors, overlooking that in 1949, in connection with certain aspects of the Fair Value Legislation effective January 1, 1946, the court had reiterated the presumption that tax officials have discharged their "duties." People ex rel. Ingram v. Wasson Coal Co., 403 Ill. 30, 37 (1949). See n. 6 at 14 of the Jurisdictional Statement. The duties of Illinois' tax chiefs, the Directors of Revenue, include the enforcement of the uniformity clause of the Illinois Constitution and the Fourteenth Amendment. Broader use of the true presumption in *Hillison* and *Kohorst* would have placed the burden of proof on the railroads as regards the value of their property. Restricting "duties" to statutory ones, the supreme court below in those two cases placed the burden of proof of railroad property valuation on the People, who had not offered adequate evidence. See pp. 44-47 *infra*.

[3] In 1943 the Illinois Legislature concentrated responsibility for the administration of the property tax in one official, the Director of Revenue. The legislature has, since 1943, commanded the Director in the following language: "Each department shall have an officer at its head who shall be known as a director, and who shall, subject to the provisions of this Act, execute the powers and discharge the duties vested by law in his respective department. The following officers are hereby created: . . . Director of Revenue, for the Department of Revenue. . . ." ILL. REV. STAT. ch. 127, § 4 (1965, 1963, 1961, 1959, 1957, 1955, 1953, 1951, 1949, 1947, 1945, 1943). The Director's term of office is "two years from the third Monday in January of each odd-numbered year and until his successor is appointed and qualified." *Id.* § 13. The Director is required to "report in writing" at least annually to the Governor, who appoints the Director by and with the advice of the Senate. *Id.* § 25.12. The Illinois Constitution provides: "The supreme ex-

which contains the largest number of railroads, the highest state assessment of railroad property and the most units of local government,[3a] this interference has created a precedent of widespread influence, which is all the more significant because after 1933 Illinois state tax administrators were acknowledged as leaders in the improvement of state tax administration. The judgments of the Supreme Court of Illinois now appealed to this Court culminate a line of eight decisions during the decade 1955-1965. The effect of *Hillison* and *Kohorst supra* decided in 1961 was to order the People's agents, the county tax collectors, to return to the railroads for the period 1957-1962 approximately ninety millions of the public revenue and to require the Governor's tax chiefs in the future to discriminate against the People of Illinois in favor of the railroads via valuation methodology.[4]

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ecutive power shall be vested in the governor, who shall take care that the laws be faithfully executed." ILL. CONST. ART. V, § 6 (1870). His removal powers are specified in ILL. CONST. ART. V, § 12 (1870). The official oath is: "I do solemnly swear (or affirm, as the case may be,) that I will support the constitution of the United States, and the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of ——— according to the best of my ability." *Ibid.*, ART. VI, § 25.

[3a] VII CENSUS OF GOVERNMENTS 1962, No. 13, GOVERNMENT IN ILLINOIS. Illinois ranked first in number of local governments: 6,542 units, including 102 county governments of which 5,388 had property-taxing power, comprised of 1,251 municipalities, 1,433 townships, 1,540 school districts and 2,126 special districts. In 1962 Madison County had 113 units of local government of which 101 had property-taxing power, comprised of 24 municipalities, 24 townships, 15 school districts, and 49 special districts. Cook County had 460 units of local government of which 442 had property-taxing power, comprised of 119 municipalities, 30 townships, 151 school districts and 159 special districts. In 1962, Illinois' per capita property tax bill was $130.28, 127% of the national per capita property tax bill. *Id.* at 36, 8.

[4] Three decisions of the Supreme Court of Illinois in 1955, 1956 and 1959 denied property tax relief to three railroads. C&NW v. Dept. of Revenue, 6 Ill. 2d 278 (1955), cert. denied, 351 U. S. 950 (1956), rehearing denied, 352 U. S. 859 (1956) (al-

The effect of the Appellees' Motion is to obscure the nature and the extent of this interference by the Supreme Court of Illinois with the state administrative process. The Motion obscures the truth that the evidence which frames the questions presented is small in quantity and indisputable in meaning. See pp. 32-33 *infra*. The element which dominates the record before this Court is the inflating price level since 1946.[5] The response to inflation by Illinois' state tax administrators was uniform. They disregarded the effect of the inflating price level both in equalizing locally assessed property and in assessing railroad property.[6] As time passed, the property tax burden

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leged overassessment); People ex rel. Callahan v. GM&O, 8 Ill. 2d 66 (1956) (alleged discrimination); CB&Q v. Dept. of Rev., 17 Ill. 2d 376 (1959) (alleged overassessment). In October, 1960 all three railroads, pursuing claims of unconstitutional discrimination, filed appeal records in the supreme court below. The C&NW and GM&O appeals from Sangamon County for tax year 1957 were consolidated, and the Supreme Court of Illinois handed down twin decisions in Hillison and Kohorst on March 29, 1961, which not only granted the relief prayed in full but also sub silentio eliminated the influence of cost of and investment in property in the valuation of railroad property, in effect overruling the earlier 1955 and 1959 decisions on this point, 22 Ill. 2d 88, 104. See pp. 63-69 *infra*. See note, Map #3, Appendix B.

[5] "By inflation we mean a time of generally rising prices for commodities and factors of production." SAMUELSON, ECONOMICS —AN INTRODUCTORY ANALYSIS 268 (6th ed. 1964). Substantial historical evidence available in 1946 supported the view that the price level would not inflate or continue to inflate following World War II. See, *e.g.*, Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Com., 262 U. S. 276, 289, 303 n. 15 (1923) (Brandeis, J., concurring). The removal of federal price controls, the pent up demand for goods, and short supply contributed to the steep and sharp inflation which commenced in 1946, intensified in 1950 by the outbreak of the Korean hostilities. See Appendix B at infra.

[6] The trial judge, Hon. James O. Monroe, Jr., on August 20, 1964, entered judgments ordering tax refunds for the railroads after hearing evidence from time to time during a period extending from April to July 1964. The trial court's findings reflect the conclusion that whereas the Directors of Revenue had failed to

increased for all taxpayers because of expansion of local governmental activity, forcing the tax rates to increase. At the instance of three railroads, the Supreme Court of Illinois in 1961 enforced the uniformity clause of the Illinois Constitution, which limits the conduct of the Legislature, the Governor and his administrative tax chief. See pp. 19-33 *infra*. Implementing constitutional mandate, the Supreme Court of Illinois tied the value of locally assessed property to the inflation balloon but failed to connect the value of railroad property to the same balloon.[7]

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eliminate completely discrimination between locally assessed property and state assessed railroad property, they had been successful in containing and reducing it 1949-1962, until the legislature in 1963 acted to provide explicit statutory authority for state equalization of railroad property assessments with state equalized local assessments.

[7] Price is a key determinant of property value. See, *e.g.*, TAUSSIG, PRINCIPLES OF ECONOMICS 111-13 (1922). Railroad witness Rolf Weil, an economist, academician and rigorous theorist, expressed his opinion on the value of locally assessed property in Madison County (and in other counties in Illinois and elsewhere on behalf of railroads) proceeding from the premise that current price (spot price) in the market place as captured in assessment-sales ratio studies produces value. See n. 27 at 51 *infra*. So rigorous is Weil's application of theory that he condemns averaging such annual sales ratios for a period of years ("period" prices) in order to determine value of locally assessed property. Less rigorous, the staff of the Interstate Commerce Commission based its reproduction-cost new figures on "period" rather than "spot" prices. See, *e.g.*, INTERSTATE COMMERCE COMMISSION, BUREAU OF VALUATION, STATEMENT OF METHODS EMPLOYED IN THE ASCERTAINMENT OF THE ELEMENTS OF VALUE as of January 1, 1948, 1950, 1951, 1952, 1953, 1954, 1955, 1957, 1958, 1959, 1961, 1962. Peo. Ex. 72. IV Exhibits. Appellant sponsored testimony of an economist and property tax expert on the valuation of railroad property, whose opinion is that reproduction cost and therefore price inflation should also be given significant, if not predominating, weight in valuing railroad property. Speaking through one of Janus's mouths, the railroads condemned the appellant's economist as "theoretical economist" and "economic theorist," Rr. Briefs at II Ill. Sup. Ct. Rec. 84 (p. 32); I Ill. Sup. Ct. Rec. 22 (p. 19), having first sponsored an economist to opine on the value of other people's property based exclusively on "spot" prices.

This was done despite the fact, now proved for the first time in this case, that the Directors of Revenue, after 1948, had achieved an equipoise between the two categories of property, each resting on opposite ends of a figurative seesaw. Imbalance resulted when the Supreme Court of Illinois relieved the railroads of the effect of inflation and refused to do the same for all other property owners. The seesaw is now tilted significantly. Constitutional decision requiring that the property tax bill for local government in Illinois must be distributed between state assessed railroad property and locally assessed property by deflating the value of railroad property and by inflating the value of locally assessed property serves to insulate railroad property from *ad valorem* taxation to an extent exceeded in its effect only by outright exemption.[8]

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[8] The shift of the property tax burden from railroad property to non-railroad property ordered by the Supreme Court of Illinois is more onerous for Downstate and Madison County taxpayers than for Cook County taxpayers. Of the 102 Illinois counties, the three which in 1962 contained the largest total assessed valuations were Cook, DuPage and Lake, all contiguous and in the Chicago metropolitan area. Madison County ranked fourth. In 1962 state assessed railroad property composed 4% of the total tax base in Madison County; it composed only 1.7% of the total tax base in Cook County, which contained 46% of the total property tax base of Illinois. In 1962 state assessments of railroad property composed 3.7% of the tax base in Downstate Illinois. Peo. Ex. 20F, 19A. I Exhibits.

Chicago is not only a major transportation hub of the nation but apparently includes a large portion of the railroad property in the state; twenty trunk lines originate there. As America's railroad empire developed, Chicago was at the end of the line for the eastern railroads and the beginning of the western railroads. Halvorsen, "Chicago Is Busy Hub of Vast Transportation Network," Chicago Tribune, Mar. 7, 1966. **Nevertheless, in 1962 only 28% of the total state assessment of railroad property was in the Cook County tax base and 72% in Downstate Illinois!** Approximately 3.3% of the total state assessment of railroad property and 4.6% of the Downstate Illinois portion was in Madison County. Peo. Ex. 20F, 19A. I Exhibits.

Even in Cook County the voters have rebelled against the growing property tax load. There the tax rate jumped from

The tilt in the seesaw will worsen as inflation intensifies. If inflation continues and the investment in and cost of railroad property increase, as does the value of other people's property, the proportionate share of the tax burden borne by the railroads will automatically decrease. *Mirabile dictu!* See n. 29 at 40, Jurisdictional Statement. Legislatively prescribed equalization of railroad property valuations, if based upon deflated figures, does not eliminate this intensifying discrimination.

The Record in this case is the first and only one of six filed in the Supreme Court of Illinois 1960-1965 which contains data over a significant period of time for all state assessments of railroad property, revealing assessment methodology **and** explanatory evidence concerning the debacle of the Illinois Full Value Equalization legislation which went into effect on January 1, 1946.[9] Perhaps the

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$2.75 per $100 of assessed valuation in 1946 to $5.32 in 1962. In 1962 the voters rejected by substantial majorities six bond issues totaling $66 million submitted by the city administration for sewers, street lighting, incinerators and other public works, all "needed improvements." The Chicago Tribune editoralized: "Other large cities are in the same boat, because property owners everywhere resent high taxes. Mayors of all the cities have been clamoring for more help from the federal government to relieve the pressure on local taxpayers . . . the voters should not overlook the fact that shifting the tax collecting process to the federal government does not relieve them of paying the taxes. All taxes—federal, state and local—are paid in the end by the same people." Chicago Tribune editorial, Feb. 23, 1966. As a result of the 1962 vote, the public works program has come almost to a halt. On April 20, 1966, the Mayor proposed six new bond issues for $195,000,000, assuring the voters that approval of the issues would not increase property taxes. Chicago Tribune, April 21, 1966, p. 1, col. 5; Sullivan, "The Bond Issue: Daley Spells Out Benefits to City," Chicago Sun-Times, April 21, 1966, p. 1, col. 1. See Lens, "Daley of Chicago," 30 The Progressive, No. 3, 15 (Mar. 1966).

[9] "In any evaluation of this conflict [between law and assessment practice] it is important to note that the extent of administrative deviation from the market value standard hinges primarily on the dynamic fluctuations of the price level because of

record is also the first from the lower courts to arrive here and meaningfully suggest a cardinal consequence of post-World War II inflation on *ad valorem* tax assessments by

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the essentially static nature of real property assessments . . . . It was this same interaction of steadily rising property values and relatively static assessments since World War II that has now plunged real estate assessment ratios to their lowest level . . . . Although the various rationalizations employed to justify administrative deviation from the state full value assessment laws lack substantive validity, they do point up the presence of political obstacles to the attainment of full value assessment. State officials charged with responsibility for raising depressed local assessment levels to the full value standard fear that the state administration in general and the governor in particular will be blamed for the increase in the local property tax load . . . . Because state tax authorities are usually directly responsible to the governor they will not disturb the local status quo without first obtaining the governor's approval. Most governors have been extremely reluctant to pull local fiscal chestnuts out of the fire by ordering 'blanket' increases in local assessment levels . . . it is not difficult to understand why assessment officials or those who control local assessment policy tend to freeze assessed valuations during periods of rising property values rather than run the risk of becoming political scapegoats by constantly increasing assessed valuations. 'If it is suggested that the officials are lacking in courage, there is the obvious rejoinder that it takes extraordinary courage to do something that is predestined to have an undesirable development for which you are not responsible, but for which you know you will be blamed. California State Board of Equalization, Annual Report, '50-'51, p. 5' . . . . The tradition of local assessment autonomy stands out as the second major barrier to administrative compliance with state assessment law . . . state property tax experience indicates that in the absence of effective political support, it is futile to give state tax authorities coercive authority over local assessment officials. Most state tax authorities are keenly aware of the distinction between legal authority and political power. Because their tax chiefs ordinarily lack sufficient political support from the governor and state legislatures, state tax officials are required to handle local assessors with 'kid gloves' . . . ." "Conflict Between State Assessment Law and Local Assessment Practice," a paper delivered in June 1965 in Milwaukee by Dr. John Shannon, Senior Analyst, Advisory Commission on Intergovernmental Relations, at a Conference on Property Taxation U. S. A. sponsored by the Committee on Taxation, Resources and Economic Development. See also Shannon, THE CONFLICT BETWEEN LAW AND ADMINISTRATIVE PRACTICE IN THE VALUATION OF PROPERTY FOR TAXATION IN KENTUCKY, BULLETIN NO. 31 OF THE BU-

state officials of railroad property: widespread obscurant and arbitrary administrative integration of the distinct functions of valuation and equalization into the single act

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REAU OF BUSINESS RESEARCH, COLLEGE OF COMMERCE, UNIVERSITY OF KENTUCKY (1957).

The decision by Illinois' Directors of Revenue to ignore price level increases in equalizing locally assessed property and in assessing railroad property, deferring to local assessment policy of elective local assessors in the counties of Illinois, was, according to the record and all other available information, made during the period 1949-1950. In concrete terms, this policy decision was implemented by holding the line on multipliers certified to the counties for equalization purposes, allowing for adjustments to offset any change in local assessment policy, and holding the line on state assessments. As time passed and inflation continued, this policy decision, inherited by successive administrations, increasingly brought Directors of Revenue in conflict with statutory duties of full value equalization of locally assessed property and full value assessment of railroad property.

On November 30, 1961, the 72nd General Assembly enacted H. Bill No. 17 creating a Commission on Revenue, and on June 15, 1963, the Commission transmitted its final report to the Governor. The research staff was headed by Dr. H. K. Allen, who had acted in the same capacity for the 1949 Revenue Laws Commission. Dr. Allen wrote chapter XIV on "State Equalization of Local Assessments" at 506-520. At 516-519 he wrote: "Until recently, the Department of Revenue never officially disclosed the standard used in computing county multipliers. [From the assessment-sales ratio studies for Lee County, 1946-1957] it is evident that the standard for computing county multipliers has not been full, fair, cash value at any time since the program became effective in 1946 . . . . In the opinion of the writer the debasement of the standard used in equalizing locally-assessed property has resulted primarily from strong outside pressures . . . . Blame for the situation lies largely with the prevailing form of administrative organization for state equalization and assessments which, because of its political orientation, is especially vulnerable to outside pressures. No criticism of the personnel of the Department of Revenue is intended. The Department has on its staff many highly competent and dedicated individuals. *The incumbent Director of Revenue has 'inherited' the present situation from his predecessors.*" See REPORT TO GOVERNOR DWIGHT H. GREEN FROM THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE TAX PROBLEMS, Mar. 2, 1945 (precursor of Full Value Legislation approved in June, 1945) (Executive Secretary, Lynn A. Stiles, key aid to Director of Revenue, whose testimony is at R. 2272-2336, 2459-2466. IV Test.); REPORT OF THE REVENUE LAWS COMMISSION OF THE STATE OF ILLINOIS 54 (1949); remarks of Ernest C. Marohn, Assistant Director of Rev-

of assessment.[10] Judicial denomination of such deflated assessments as value determinations discriminates against locally assessed property figured at full value.

II. APPELLEES' MOTION FENDS PLENARY CONSIDERATION BY EXPLOITING THE CONFLICT BETWEEN LAW AND ADMINISTRATIVE PRACTICE.

The inadequate record which characterizes the Illinois uniformity litigation 1960-1965 is not uncommon. Nor are the causes peculiar to Illinois. One explanation is the manner in which the uniformity issue arises and its inherent difference from the overassessment issue. In overassessment litigation the railroad enters the courts on statutory levels involving the question of whether its property has been assessed in excess of the legal standard for a particular year. Not only does the record fail to contain evidence of the assessments of that railroad's property over a significant period of time, but also

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enue, October 1950 in ASSESSMENT ADMINISTRATION: 1950, pp. 64-66 (pub. by National Association of Assessment Officers) (in Library of Congress); ILLINOIS PROPERTY TAX STATISTICS for 1943, 1944, 1945, 1946, 1947, 1948 (by Property Tax Division of the Illinois Department of Revenue) (no publication after 1948).

[10] "It should be emphasized at this point, I believe, that there is a fundamental difference between assessment and equalization . . . . It seems that the essential element in equalization is the determination of the common denominator or yardstick. Without such a yardstick it is impossible to measure variation in assessment levels in different areas and for different classes of property. Since assessments are supposed to be according to value, value must be our yardstick and our concept of value must be clear and certain." MAYNARD, THE ILLINOIS PROGRAM OF EQUALIZATION, PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 268-269 (September 1949). See n. 22 at 35 *infra*; pp. 75-76 *infra*.

Note 20 at 33-34 of the Jurisdictional Statement incorrectly states the text of Question 20 in the NATA Committee Questionnaire, answers to which are corroborative of state administrative assessments of railroad property at less than the legal standard. Question 20's correct text is: "Where the statute requires that public utilities be assessed on a full value basis would you say there

it does not contain evidence of the assessments over time of other railroad property within the jurisdiction. Even if the record were adequate in these two areas, there is no revealing evidence about the conduct, over a significant period of time, of state administrative officer(s) vis à vis equalization of locally assessed property. In such litigation the assessment of railroad property is upheld if it does not exceed the legal standard. Whether or not the railroad property assessment is less than the legal standard is not germane to the issue before the court in such cases.

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is some tendency, administratively, to debase the full value assessment to a certain extent to allow for the lower assessment level prevailing locally?" In 1953 the Tax Commission of Washington initiated a program in which the level of assessment of state assessed railroad and utility property would be reduced about 10% a year until it was in line with the level of assessment of locally assessed property. The program will be completed in 1967. Letter from George Kinnear, Chairman, Tax Commission of the State of Washington by Clyde B. Rose, Property Tax Director, to Burton C. Bernard, April 4, 1966.

In 1961 the total property tax assessments in the United States subject to "local general property taxation" were $367,323,000,000. The total figure subject to "local general property taxation" after exemptions was $355,716,000,000. Of this latter figure, 1.7%, or $5,939,000,000, consisted of state assessed railroad property subject to "local general property taxation", and 5.3%, or $18,754,000,000, consisted of state assessed "public utility" property subject to "local general property taxation". State assessed railroad property subject to "local general property taxation" ranged on statewide bases, from 8.3% of total assessments in West Virginia to .7% in Maryland. II CENSUS OF GOVERNMENTS: 1962, "TAXABLE PROPERTY VALUES" 28-29. (Peo. Ex. 58. I Ex.) See Appendix E, Jurisdictional Statement A-51. Counsel for Appellant have to date seen data on state assessments of railroad property for only a limited number of states, but have confirmed that since the late 1940's state assessments of railroad property have not increased significantly, if at all, and indeed have generally decreased since the mid-1950's in the following states: Idaho, Illinois, Iowa, Missouri, Montana, South Dakota, Utah, Washington, Wisconsin and Wyoming. In Alabama, California, Utah, Michigan, state assessments have been declining since 1957. See n. 22 at 35 and Appendix B at v *infra*.

In contrast, the uniformity issue does involve state administrative action toward both categories of property; and, in the uniformity case, relief for the taxpayer is maximized by proving that the railroad property assessment is at the legal standard (or higher) and that the equalized assessment of locally assessed property is far below the legal standard. In any event, the typical record in uniformity cases involves one or two railroads for one or two years, and the evidence over time with regard to both categories of property is lacking. Proof limited to such narrow ambits in the complex field of post-World War II property tax administration cannot provide the insight and perspective requisite to sound decision.

A second cause of the inadequate record in the uniformity case, however and wherever it arises, is the penumbral silence of state tax administrators. Appellant submits that the silence is produced by the political consequences thought to ensue from a candid exposure of conflict between the law and state administrative practice. This conflict has deepened since 1946 because of inflation, local asessment practice and mounting local government needs. Comprehension requires precise definition of contemporary functions of state administrations in raising revenue for local government. Popularly elected, Governors generally appoint the administrative tax chiefs, whether a single person or a multi-member commission.[11] The Governors' appointees have since World War II confronted two legal duties imposed by legislative enactment: (1) to increase the total local assessment in each county to the legal standard of assessment (inter-county equali-

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[11] As of the early 1950's there were ten states in which state assessment and equalization functions were concentrated in one official: Alabama, Florida, Georgia, Illinois, Massachusetts, Minnesota, New Jersey, Ohio, South Dakota, Vermont and Wisconsin. Rr. Ex. 64, p. 68. XI Exhibits.

zation); (2) to assess a minute portion of the tax base, *e. g.*, railroad property, according to the same legal standard of assessment. (See Maps #1 and #2, Appendix B at v *infra.*) These standards are based on the economic concept of value. The state tax chiefs also confront overriding legal duties imposed by state and federal constitutions.[12] During the late 1940's and early 1950's it was not clear whether the law required property tax valuations and assessments to be based on current prices if extraordinary inflation or deflation existed.[13]

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[12] Comprehensive analysis of state constitutional uniformity provisions is in NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN TAXATION (1959). "The subject of discrimination and denial of equal protection of the laws under the United States Constitution occupies a prominent place in our daily newspapers. However, the subject of equal protection of the laws is not limited to the field of civil rights, but is also the primary organic principle governing the ad valorem property tax." Robert F. Kilmer, Esq., Counsel, New York State Board of Equalization and Assessment. PROCEEDINGS, NATIONAL TAX ASSOCIATION 413 (1958).

[13] The "normal value" theory is that valuation of property for assessment purposes need not reflect "boom or bust" prices. See I BONBRIGHT, THE VALUATION OF PROPERTY 463-71. For a discussion of the problem by a key advisor to the Director of Revenue 1943-1949, see STILES, "FULL FAIR CASH VALUE" IN THE 1945 ILLINOIS ASSESSMENT EQUALIZATION PROGRAM, XXXII BULLETIN OF THE NATIONAL TAX ASSOCIATION 34, 38-40 (1946). In 1946 the National Association of Assessing Officers sponsored a panel discussion on "What Weight Should Assessors Give to Current Real Estate Prices in Determining Assessed Valuations?" ASSESSMENT ADMINISTRATION: 1946. In June 1954 the Committee on Sales Ratio Data of the National Association of Tax Administrators issued "Guide for Assessment-Sales Ratio Studies." Such studies measure the relation of current real estate sales prices to assessment. Chaired by the Director of Revenue's staff assistant in charge of the Chicago office of the Property Tax Division, E. L. Maynard, the Committee stated in its introduction: "The committee in presenting these suggestions is not proposing to say how the results of such studies are to be used, but would like to point out that sales ratio studies provide a wealth of information to tax administrators and taxpayers." Peo. Ex. 52. I Exhibits. In August 1956 the Ratio Study Committee of the National Committee of Railroad and Public Utility Tax Representatives issued a re-

Following World War II, local assessors did not increase assessments as the price level escalated. The explanation involves political considerations.[14] Thus the legal onus was placed on state tax administrators to raise local assessments in the counties to the legal standard, an exceedingly difficult matter because of unrelenting inflation and political reality.

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port detailing assessment sales ratio findings in many states. In 1957 the Bureau of Census published TAXABLE PROPERTY VALUES, predicating its findings on level of assessment and value of locally assessed real property on "spot" prices. In May 1957 the University of Kentucky published for its Bureau of Business Research THE CONFLICT BETWEEN LAW AND ADMINSTRATIVE PRACTICE IN VALUATION OF PROPERTY FOR TAXATION IN KENTUCKY by Dr. John Shannon. At 39-42 the author discussed the "normal value" argument and urged its abandonment as theoretically unsound and subjective in nature. In 1962 the Bureau of the Census issued its second TAXABLE PROPERTY VALUES predicated upon value equaling current price. In 1963 the Advisory Commission on Intergovernmental Relations published THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX, which accepted and utilized locally assessed property values based on the "spot" prices employed in Bureau of Census studies. In 1965 as Senior Analyst, Advisory Commission on Intergovernmental Relations, Dr. Shannon wrote: "This theory undoubtedly made a deep impression on assessment officials and also provided them with a convenient and apparently plausible rationalization for failing to adjust tax assessments to the dramatic advance in property values, particularly between 1946 and 1952 . . . . Although the normal value theory may have had some technical plausibility immediately after World War II, it has since become thoroughly discredited. . . ." "Conflict Between State Assessment Law and Local Assessment Practice," a Paper delivered before the Conference on "Property Taxation U. S. A." at Milwaukee, June 1965.

The actions of many state legislatures in providing for official sales ratio studies following World War II indicate that they believed current prices were at least pertinent in the determination of value. See GRONOUSKI, EQUALIZATION PROGRAMS AND OTHER STATE SUPERVISORY ACTIVITIES IN THE PROPERTY TAX FIELD 13-20 (1957) (Federation of Tax Administrators).

[14] "To assess property at its market value at a time when inflation has skyrocketed the cost of small homes might easily increase the cost of real estate to the point where many lower-income and middle-income people could not afford home-ownership. The tax assessor undertaking such a project would be inviting political if not personal disaster." Louisville Courier-Journal, February 5, 1953 (editorial).

If a state tax administrator during the post-World War II period had increased local assessments to the legal standard on the theory that current price equals value, the following consequences were seen to threaten. Voter resentment directed against the state administration would develop.[15] State aid to the local tax districts, if affected by the level of assessment, might decrease.[16] An amalgam of such factors explains why the Directors of Revenue of Illinois have never equalized county-wide local assessments according to full value based on current sales prices. See pp. 48-58 *infra;* n. 9 at 9 *supra.*

To admit on the record that the Director of Revenue was ignoring inflation in certifying equalization multipliers to the counties would invite colorable accusation of malfeasance. Moreover, in a state such as Illinois, where the political power structure underlying state government is dependent upon accommodations between Cook County and Downstate Illinois, political adversaries of the state administration could use the admission to advantage. Perhaps the least objectionable prescription for such a difficult situation has been seen to be official silence on all sides as local government needs are met by practical agreements between contending power blocs. To admit that the Directors of Revenue, in order to be fair, were also ignoring inflation in assessing railroad property would also invite colorable accusations of malfeasance for deviating from

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[15] See n. 9 at 9 *supra.*

[16] From 1948 to 1958, state aid to local school districts in Illinois increased from $28,330,000 to $104,485,000, with about 32% of the total going to Cook County. The proportion of total school district revenues received from the state was larger at all times during this period in Downstate Illinois. By 1963 state aid to local school districts had increased to $169,976,000, with the percentage going to Cook County increasing to about 38%. ILLINOIS SCHOOL PROBLEMS COMMISSION No. 7, p. x (1963). See n. 30 at 58 *infra.*

the legal standard of assessment. See Appendix E, Jurisdictional Statement A-51.

The dilemma created by the conflict of law and assessment practice engulfed the Directors of Revenue of Illinois increasingly as the price level continued to inflate after 1948. The dilemma intensified for successive state administrations. The CB&Q, C&NW and the GM&O exploited this dilemma in building judicial records.

Utilizing the Director of Revenue's own data proving that the state-certified multipliers did not increase county assessments as inflation continued, the railroads sponsored an independent economist to testify on the value of locally assessed property based exclusively on that data, increasing value. With regard to the value of their own property, the three railroads simply asked a loyal civil servant, the "Supervisor of Railroad Assessments" 1949-1960, whether certain of the Directors' assessments of their property equalled full value. Really, the railroads were asking Raymond S. Danis, "Have you and your Chief complied with the statute?" The answer was "Yes." Raymond S. Danis, the witness, was not only caught between the countervailing moral forces of truth, loyalty to his Chief, and self-interest but also he was pressed down by earlier entrapment.[17] In 1966, before this Court, despite the data and insight provided by a detailed, specific record, the

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[17] Railroad entrapment of state tax administrator Raymond S. Danis, a staff aid, occurred before a staff legal aid of the Director of Revenue of Illinois in January 1954. In January 1954, as the instant record now proves, the Director had been, since the late 1940's, ignoring inflation in the valuation of locally assessed property for equalization purposes and in the assessment of railroad property. In 1953, as the instant record now proves, the Director had applied a "judgment factor" to reduce the formulaic average of the elements of value for the C&NW's property by $10,980,000, which was $6,086,000 more than the "judgment factor" reduction applied to reach the 1952 tax assessment,

railroads advance this bare **conclusion** as a ground for avoiding plenary consideration of the questions presented. See Appellees' Motion at 17, lines 21-23; at 35, lines 29-31;

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the increase in reduction eliminating an increase in the formulaic average of $5,086,000 for 1953 over 1952 and reducing the 1952 assessment by $1,000,000.

Following an official newspaper publication during late 1953 of the Director's "original" assessments of railroad property for 1953, the Chicago and Northwestern Railroad, pursuant to Ill. Rev. Stat., ch. 120, § 618 (1963) applied for "a review and correction" of the Director's "original" assessment, claiming only that the assessment was in excess of the statutory standard of full value. In January 1954 Raymond S. Danis, the Director's staff "railroad assessor" since 1949, was on the witness stand under oath. The following exchange, which occurred on cross-examination of Mr. Danis, helps explain all the subsequent testimony of Mr. Danis in the courts of Illinois 1959-1961 that certain of the Directors' assessments of railroad property of the C&NW, GM&O and CB&Q were at full value:

> **Cross-Examination of Raymond Danis by Railroad Counsel:**
>
> "Q. You said, Mr. Danis, that your assessment method was uniform among railroads as a class?
>
> "A. That's right.
>
> "Q. Am I to understand from that you would assess railroad property on a different basis in relation to its fair cash value than other property?
>
> "Mr. Ice [Director of Revenue's legal advisor and hearing officer]: Well, Mr. Trottman, I'll have to object to that for this reason: Mr. Danis works on nothing but railroad assessments. He can't very well answer about other property, I don't think. [Danis was directly responsible to the same official who certified multipliers to the counties for locally assessed property.]
>
> "Mr. Trottman [Rr. counsel]: At any rate, **you regard the assessment at the full, fair cash value of the property?**
>
> "The Witness: A. **Yes.**
>
> ". . ." (R. 87-88 of C&NW v. Dept. of Revenue, 6 Ill. 2d 278, 1955, Docket No. 3510, Vault No. 58173.)

This testimony under oath protected the Director of Revenue and was the perfect answer to serve the railroad's interest in uniformity litigation. The testimony elicited by railroad counsel committed the administrative aid to the **conclusion** that railroad property for 1953 bore 100% level of assessment, even though on the issue then at hand it was in conflict with the railroad's contention that its property assessment exceeded value; in eliciting it, the railroad weakened its case. The C&NW

and at 37, lines 29-32. The trial court was not governed by this type of evidence. Jurisdictional Statement A-27.

III. THE JUDGMENTS BELOW RESULT FROM AN APPLICATION BY THE SUPREME COURT OF ILLINOIS OF THE UNIFORMITY CLAUSE IN ARTICLE IX, SEC. 1 OF THE ILLINOIS CONSTITUTION TO THE FACTS OF THE CASE.

The railroads deny that the refunds awarded them by the trial court and increased by the Supreme Court of Illinois derive from judicial vindication of their constitu-

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foray of 1954 was repeated by the CB&Q on January 9, 1958, when the Director's 1957 assessment of the CB&Q's property was the subject of an administrative hearing before the same hearing officer who presided in 1954, Mr. Ice. At this time, as the instant record now proves, the Directors for almost a decade had been ignoring inflation in equalizing locally assessed property, and the "judgment factor," applied to reduce the average of the elements of value to produce the CB&Q's property assessments, had increased from $20,157,000 in 1951 to $47,983,000 in 1957.

Cross-Examination by Railroad Counsel:

"Q. Mr. Danis——

"A. Yes, sir.

"Q. ——is it correct to say that the task of the Department of Revenue in making assessments of this nature, is to ascertain the fair cash market value of the railroad property, subject to assessment?

"A. Yes . . .

"Q. **But** the end result of what you propose, or **what you do here is to arrive at a fair cash value**, . . .? [See the same question asked in Tennessee in 1965 at 22 *infra*.]

"A. I presume that that is correct." R. 442, 17 Ill. 2d 376 (1959) (Docket No. 35055, Vault No. 58949).

The inadequate records in these two administrative hearings were the bases of two Supreme Court of Illinois decisions. The second decision at 17 Ill. 2d 376 was handed down on September 24, 1959. The court's opinion did not address itself to the equalization duties or conduct of the Director as regards locally assessed property, and at 391 uttered the *dictum* that on statutory levels the Director could not assess railroad property at less than full value. Twenty-seven days later on October 22, 1959, Mr. Danis appeared in Madison County for a judicial hear-

tional rights. At 18-20 their contention is explicit; relief is based on *People ex rel. Callahan v. GM&O Rr.*, 8 Ill. 2d 66 (1956) (Dailey, J.) (relief denied on pleadings) and

> "Under Callahan there resulted constructive fraud as a matter of Illinois law, without regard to any provision of the Illinois or Federal Constitutions."

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ing on uniformity issues, and with Mr. Ice present testified that the Director's assessments of the property of the GM&O 1952-1957 were at full value. In October, 1959, the Director, as the instant Record now proves, was still ignoring inflation in the equalization of locally assessed property, and the "judgment factor" reductions applied to the elements of value to reach assessments of the GM&O's property had increased from $8,867,000 for 1951 to $26,088,000 for 1957. (The failure of the Directors to implement the full value legislation had not yet been adjudicated by the Judiciary and it was *sub rosa*.) Notwithstanding the railroads' leverage on him, Mr. Danis testified in October, 1959, when he was pressed by railroad counsel:

> "Q. I . . . ask if the figures on these various notices were not final assessments made of the GM&O for [1953-1957] at full, fair cash value?
>
> . . .
>
> "Q. Well, in your opinion, do they represent the full, fair cash value of the railroad for the years mentioned?
>
> "A. This represents the full **assessed** valuation as certified or as—on which the notice was given to the railroad for the years in question, yes.
>
> . . .
>
> "Q. . . . And that in your opinion represented its full, fair cash value of the railroad for each of those years, did it not?
>
> "A. Well, the letter states that its the full **assessed** valuation.
>
> "Q. Well, can you answer my question?
>
> "A. Yes.
>
> "Q. It does represent, then, in your judgment——
>
> "A. In the Director's judgment, it represents the full, fair cash value.
>
> . . .
>
> "A. No, in the end it is his [the Director's]. In the end it is his judgment.
>
> "Mr. Gillespie: That's right. I think that's all.
>
> "Mr. Dobbs: It does represent full fair cash value?
>
> "A. Yes . . ." Rr. Ex. 76, pp. 33-5. XI Exhibits.

Cf. n. 28 at 52 *infra*. Appellees, at their n. 10, pp. 18-19, stress orders entered on November 3, 1959, less than two weeks after Danis' testimony, without mentioning that the People were

At 31 Appellees state that *Hillison* was not founded on "Constitutional grounds." Similarly do the railroads describe the basis of *Kohorst* at 33 and of *Korzen* at 37.

We invite this Court to consider an earlier interpretation of the nature of the taxpayer's right, which was

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represented at the hearing by Dick H. Mudge, Jr., State's Attorney, whose brother, John Mudge, Esq., the Assistant State's Attorney conversant with the litigation, had died prior to Danis' appearance in Madison County. See Jurisdictional Statement A-16.

On January 21, 1960, three months later, with Mr. Ice still the Director's legal aid, now also "Special Assistant Attorney General" (not "Assistant Attorney General" as represented by the railroads at 31 of their Motion), Danis gave testimony in a second judicial proceeding involving uniformity issues, the trial in Hillison, 22 Ill. 2d 88 (1961). Danis stated that the 1958 assessment of the CB&Q, $147,000,000, was at full value. But he also responded to the leading interrogation of Mr. Ice, communicating the Directors' policy of holding the line:

> "Q. Well, now, when you made this recommendation of $147 million to the director, for 1958, for the Burlington, **were you influenced in arriving at that figure by the knowledge that he wouldn't want that assessment increased,** or by the knowledge of this continuity that you spoke of, **or by a knowledge that maybe that was done for other railroads, too, this judgment reduction?** R. 1413. III Testimony.
>
> . . .
>
> "Q. I mean, **was your recommendation influenced by that knowledge** that these things were to be considered, **such as no increase in the assessment and continuity of assessments,** and the other railroads would be based by it from their mathematical average by a judgment factor; was your recommendation of $147 million influenced by these considerations? R. 1413. III Testimony.
>
> "A. **More or less.** The debasement factor is not a constant factor for all roads. Every railroad will vary in debasement . . . (R. 1413) (III Testimony) [depending upon the mathematical interrelationship of the three elements of value for each railroad's property in each year] R. 1413, III Testimony.
>
> "Q. Well, if you were just valuing this railroad as an independent proposition **not having to be restrained by continuity and the question of what is done for other railroads,** would you think $147 million was a fair valuation or a low one?
>
> "A. Well, if this was an original valuation, I would say it was low . . . **I think the Legislature has already given the**

not vindicated in *Callahan* but which was later vindicated in *Hillison* and *Kohorst* and in the subsequent decisions leading to the case at bar. James R. Parham, Esq., one of the three counsel of record acting here on behalf of all

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> **railroads a definite valuation advantage over real estate by requiring income and market values to be considered in the case of railroads. If you valued railroads on a cost basis as is generally done in the case of real estate, then even the formula evaluation would be substantially low for full value** . . ." (R. 1413-14) (III Testimony).

Hillison has led finally to the case now at the bar of this Court. See pp. 64-67 *infra*.

Identical to the Danis entrapment was the recent colloquy during an administrative hearing on October 25, 1965, before the Tennessee State Board of Equalization sitting in review of the 1965-1967 assessment of the property of the Louisville and Nashville Railroad previously made by the Public Service Commission of Tennessee:

> "Mr. Clyde W. Key [railroad counsel asks this first question on cross-examination]: May I ask Dr. White a couple of questions? [[Dr. White, the tax and rate consultant to the Public Service Commission.]]
>
> "The Chairman [of the Board of Equalization]: Yes, sir.
>
> "Mr. Key: Dr. White, **your ultimate goal is to reach actual cash market value after application of** your seventy percent factor, and **your judgment factor is that correct?** [See the identical type question asked in Illinois in 1954 and 1958 *supra*.]
>
> "Mr. White: **Yes, sir.**
>
> "The Chairman: **Mr. Key, you** know we are not going to **admit** anything except one hundred percent assessment." Jurisdictional Statement A-57-8.

This testimony appeared at 5 of the 80-page Proceedings. At 11 L&N's attorney delusively conceded, "And as I say, we really think that the value there was excessive, but we have concluded that we are not, for the purpose of this hearing, **we are just going to concede that they did their duty full well in reaching one hundred percent actual cash value.**" L & N Rr. v. State Board, et al., 249 F. Supp. 894 (M. D. Tenn. 1966), appeal docketed, 6th Cir., April 4, 1966. The quoted testimony under oath in Tennessee contributed to federal court intervention in 1966, with the railroad proving on the pleadings studies based on inflated prices that locally assessed property was equalized at far less than full value and the railroad's property assessment was at 100% of value. The federal judge did not have before him the data or methodology of railroad property assessment over a significant period of time. Jurisdictional Statement A-53.

twelve Appellees, authored *Taxation of Property in Illinois, U. Ill. L. F.* 645, 646, 647 (1961) published following May 17, 1961, the date on which the Supreme Court of Illinois denied rehearing in *Hillison* and *Kohorst,* 22 Ill. 2d 88, 104. Mr. Parham, who, for several years has been a member of the board conducting the affairs of the Section of State Taxation of the Illinois State Bar Association, wrote in 1961:

> "Since the first constitution of this state adopted in 1818, the cardinal principle of general property taxation has been equality and uniformity as to assessments. . . .[5] In numerous cases, the Illinois Supreme Court has held that all taxing laws must be subordinated to this constitutional mandate, including laws requiring full-value assessments.[6] . . . **In those cases [Hillison and Kohorst] the railroads filed objections to the taxes extended against the state-assessed valuation of their operating property on the ground that** such property had been valued at 100% of full, fair cash value by the Department of Revenue, whereas locally assessed property, even after giving effect to the equalization multipliers, had been

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"[5] Illinois Legislative Council Publication No. 134, Constitutional Mandates for Uniformity of Taxation. [This 28-page document is devoted to exposition of the uniformity clause in Article IX, Section 1 of the Illinois Constitution, and comparable constitutional provisions in other states. The Summary at i-ii includes "2. Illinois is one of a small group of states (no more than five according to one count and certainly no more than 13 by any test) mandating a general tax under which all classes of property are to be taxed on the same uniform basis and in proportion to value. (Among even these states, Illinois ranks as having one of the most rigid uniformity roles.) . . . 7. In Illinois a constitutional amendment is quite clearly required if there is to be any consequential relaxation of the rule of uniformity in taxation. . . ."]"

"[6] [citing five cases decided by the Supreme Court of Illinois in 1945, 1944, 1934 and 1932, including People ex rel. Tedrick v. Allied Oil Corp., 388 Ill. 219 (1944);]" See pp. 25-26 *infra.*

> assessed at a level far below full value, **in violation of the uniformity clause of the Illinois Constitution** and the full value assessment provision of the Revenue Act. **The Supreme Court held that these objections should have been sustained.**" (Emphasis added.)

The counterfeit argument of the railroads to this Court, that the relief granted them by the Illinois judiciary is not based on a constitutional provision, undermines the foundations of the very judgments which benefit them. Article IX, § 1 of the Illinois Constitution provides that the property tax shall be administered by such person or persons as the legislature shall direct. Indeed, the railroads have emphasized the pertinent language at their 39. The legislature elected by the People has directed that the Director of Revenue shall administer the property tax. Therefore, the Supreme Court of Illinois has no power to interfere with the administration of the property tax by the Governor's appointee unless he has violated a taxpayer's statutory or constitutional right. Only if the Director of Revenue has violated such a right does the Judiciary have power to interfere pursuant to the Constitution's having vested the "judicial power" in the Judiciary. Art. VI, § 1. Here no statutory right of the railroads is involved, for they do not complain that the assessments of their property violated the statutory standard of assessment. They complain of discrimination, and Appellant is unaware of any common law doctrine that protects the property taxpayer against discrimination at the hands of the administrative process. In short, one fallacy of the railroads' argument that judicial action below does not rest on a constitutional basis is suggested by considering the argument's logical terminus: the judgments appealed to this Court constitute a usurpation of power by the Supreme Court of Illinois.

The big two of Illinois railroading, the CB&Q and the C&NW, early moved the Supreme Court of Illinois to

grant them relief from property tax discrimination resulting from disparate levels of assessment borne by their property and non-railroad property. The basis of this relief in 1867 was unequivocally and explicitly the uniformity clause in Art. IX, sec. 1 of the Illinois Constitution of 1848, later carried over into the 1870 Constitution. Justice Sidney Breese wrote, "The great central and dominant idea in that instrument is, uniformity of taxation"; describing "the principle of uniformity of taxation as the central and dominant object of the constitution in the assessment of taxes." 44 Ill. 229, 238, 240 (1867). Decisions of the Supreme Court of Illinois which have explicitly enforced the state constitutional command of uniformity in property taxation are: (a) at the instance of state assessed taxpayers: *Law v. People ex rel.*, 87 Ill. 385, 404-06 (1877) (rr. property); *People v. I. C. Rr.*, 273 Ill. 220 (1916); *People v. I. C. Rr.*, 355 Ill. 605, 612 (1934); *People ex rel v. Grand Trunk Rr. Co.*, 357 Ill. 493, 498 (1934); *Mobile & Ohio Rr. Co. v. Tax Com.*, 374 Ill. 75 (1940); *Ross v. Rr.*, 381 Ill. 58, 62 (1942); at the instance of locally assessed property taxpayers: e.g., *Bureau County v. CB&Q Rr.*, 44 Ill. 229, 238 (1867); *C&NW v. Boone County*, 44 Ill. 240 (1867); *C&A Rr. Co. v. County*, 68 Ill. 458, 560 (1873); *Keokuk & Hamilton Bridge Co. v. People*, 145 Ill. 596, 606 (1893); *First Nat'l Bank of Urbana v. Holmes*, 246 Ill. 362, 366 (1910); *People ex rel. v. Keokuk & Hamilton Bridge Co.*, 287 Ill. 246, 250 (1919); *People ex rel. Miller v. CB&Q*, 300 Ill. 399, 405 (1921); *Bistor v. McDonough*, 348 Ill. 624, 632 (1932); *People ex rel. v. Wiggins Ferry Co.*, 357 Ill. 173, 180 (1934).

In other decisions of the Supreme Court of Illinois, the clear command of the state uniformity clause has been carried out by describing unconstitutional discrimination as "constructive fraud." In *People's Gas Light Co. v. Stuckart*, 286 Ill. 164, 177 (1919), the state assessed tax-

payer complained of discrimination and the court, citing explicit uniformity clause cases, vindicated the constitutional right, stating that the taxpayer had been "knowingly and intentionally discriminated against and the result was a fraud upon it." In *People ex rel. Wangelin v. Wiggins Ferry Co.*, 357 Ill. 173, 180, 181 (1934), the court described discrimination violative of the state uniformity clause as "constructive fraud." And a decade later the court below wrote "excessive valuation knowingly and intentionally made in violation of the constitutional rule of uniformity amounts to a constructive fraud. . . ." *People ex rel. Tedrick v. Allied Oil Corp.*, 388 Ill. 219, 225 (1944). The labeling of such unconstitutional discrimination is meticulously traced in "'Overassessment' and 'Discrimination' Issues in the Supreme Court of Illinois, 1859-1959," which is Appendix A, People's Second Brief in the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 88.[18]

Any doubt that the judgments below rest on the uniformity clause of the state constitution is removed by the opinion of the Supreme Court of Illinois per Justice

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[18] Appellees have filed with the Clerk of this Court nine copies of their Motion to Strike the Appellant's Second Brief, filed in the Supreme Court of Illinois on May 10, 1965. This Motion is at II Ill. Sup. Ct. Rec. 100-111. Since the Motion describes the People's Second Brief as an "imposture" (p. 2), and a "contemptuous disregard of the Court's rules and impudently exploits the permission granted" (p. 5) and states that the railroads did "Not Confess Weakness by this Motion" (p. 109), Appellant is constrained to invite the Court's attention to several facts. The railroads have failed to mention, much less supply, copies of the comprehensive Suggestions in Opposition to the Railroads' Motion to Strike filed on May 10, 1965, now with the Clerk of this Court as II Ill. Sup. Ct. Rec. 113-133. Those Suggestions reveal that the railroads' Motion to Strike the People's Second Brief did not faithfully report crucial words of the Chief Justice of the Supreme Court of Illinois. Compare II Ill. Sup. Ct. Rec. 117 with id. at 101, and that the Motion contained other distortions and inaccuracies. Further, the suggestions contained explicit and pertinent citation and argument about the constitutional nature of the litigation. II Ill. Sup. Ct. Rec. 127-133. See also I Ill. Sup. Ct. Rec. 23, 24, 25, 26-61.

Schaefer in *CB&Q v. Dept. of Revenue*, 17 Ill. 2d 376, 161 N. E. 2d 638 (1959), which is not faithfully quoted or interpreted by the railroads at 29-39, 19 of their Motion.[19] In *CB&Q*, the railroad argued that reproduction cost should be eliminated as an element of value. Justice Schaefer's opinion rejected the argument. Second, the CB&Q argued that the level of assessment of locally assessed property for 1955 was about 50% of full value and that the railroad's assessment for 1957 was at full value. Justice Schaefer wrote that if the railroad could prove that the level of assessment of locally assessed property for 1957 was at 50% of full value, "**the plaintiff's operating property is bearing a disproportionate share of its tax burden in violation of the constitutional requirement of uniformity. Art. IX, Sec. 1, Const. 1870; People ex rel. Callahan v. Gulf, Mobile and Ohio Railroad Co., 8 Ill. 2d 66 . . .**," 17 Ill. 2d 376, 390. Justice Schaefer did not deny the constitutional right, nor did he indicate the extent of discrimination. He acknowledged the source of the right, and refused relief only because the proof was inadequate, adding that the proper method by which to vindicate the constitutional right was in tax objection proceedings.[20]

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[19] *E. g.*, The railroads at 29 describe CB&Q v. Dept. of Rev., 17 Ill. 2d 376 (1959) as the "Burlington 1957 Valuation Case" and overlook the date of the decision. Justice Schaefer's opinion for the Court was filed on September 24, 1959, 18 months before the decisions in Hillison and Kohorst. The case involved tax year 1957. Perusal of Justice Schaefer's opinion in the 1959 Burlington case and in C&NW v. Dept. of Revenue, 6 Ill. 2d 278 (1955) cert. denied, 351 U. S. 950, rehearing denied, 352 U. S. 859 (1955), reveals sound analysis. These two cases involved direct appeals from the Director's assessments contending that the respective railroad property assessments were higher than the statutory standard of fair cash value (full value) because reproduction cost was utilized as an element of value. See n. 4 at 4 *supra*.

[20] Justice Schaefer's opinion for the court below in 1959 stated that the proper method by which to test the issues of unconstitutional discrimination was in a tax objection case. At 391 the opin-

Even *Callahan,* now relied upon by the railroads to deny the constitutional basis of the judgments below, referred to "Section 1 of Article IX of the Illinois Constitution" in a sentence overlooked by the railroads, though it immediately follows the language from the *Callahan* opinion quoted by the railroads at their 27-28. Moreover, a dissenting opinion in *Callahan* by Justice Hershey (who later wrote the court's opinion in *Hillison*), at 8 Ill. 2d 66, 72, refers to the right as a constitutional one.

The six interrelated decisions of the Supreme Court 1961-1965, which grant relief to the railroads, render it clear that the basis of relief in all six cases is constitutional. First, the court below decided *People ex rel. Kohorst v. GM&O v. C&NW,* 22 Ill. 2d 104 (1961) (House, J.); *People ex rel. Hillison v. CB&Q,* 22 Ill. 2d 88 (1961) (Hershey, J.) on March 29, 1961. Both appeals had been filed in the supreme court below from two different counties in October 1960. At 105 Justice House wrote, "**We have jurisdiction because** the revenue is involved and **constitutional questions are presented,**" and at 113-4, the opinion refers to achieving "**uniformity**" and eliminating "**discrimination.**" At 96 Justice Hershey wrote of the constitutional requirement of uniformity. In *People ex rel. Enrietta v. GM&O,* 29 Ill. 2d 605 (1964) (House, J.) the court at 610 referred to "**discrimination . . . amounting to constructive fraud.**" In *People ex rel. Korzen v. CB&Q,* 32 Ill. 2d 554 (1965) (House, J.), the opinion refers to "**discrimination.**" In the case at bar, Justice House's opinion, set forth in the Jurisdictional Statement,

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ion stated the *dictum* that the Department has "no authority to reduce its assessed valuation of the plaintiff's property to less than full value." The citation of authority and reasoning at 390-391 establishes that the intellectual process was based on statutory provisions. The record then before the court was limited, being confined to the assessment of one railroad's property, and was presented at a time when no organ of state government had admitted or declared that the assessments of locally assessed property had since 1946 been equalized by the Director at less than full value.

referred to **discrimination** twice at A-2, and again at A-14, and also acknowledged the argument about "**constitutional compliance**" at A-4.

Finally, the trial court specifically cited the state uniformity clause as pertinent. Jurisdictional Statement A-21, 35.

The railroads appear to argue at 29 that a new right for property taxpayers was created by *Callahan* and *CB&Q* (1959). In *CB&Q v. Dept. of Rev., 17 Ill. 2d 367 (1959)* the court below uttered a *dictum* that the Director on statutory levels could not debase railroad assessments from full value, and must therefore equalize locally assessed property at full value. See n. 20 at 27 *supra*. The railroads now argue that because the relief for railroads is to be determined by recomputing the railroad taxes on the premise that all property in Madison County has been equalized and assessed at full value, thereby producing lower tax rates to be applied against the full value of railroad property, rather than by reducing railroad assessments and subjecting them to the higher rates actually extended, a new non-constitutional right was created. The argument is specious. The method of computing tax refunds for discrimination from disparate levels of assessment violative of the state constitutional uniformity clause involving railroad property and non-railroad property is irrelevant to the source of the right. The difference between the two approaches of measuring the refund suggests the difference between Tweedledee and Tweedledum.

As long ago as 1877, this Court stated on the issue of appellate jurisdiction that "Any enactment, from whatever source originating, to which a state gives the force of law is a statute of the state . . .," mentioning constitutional provisions. *Williams v. Bruffy*, 96 U. S. 176, 182-3 (1877). *Accord, Ohio ex rel. Bryant v. Akron Park Dist.*, 281 U. S.

74, 77, 79 (1930). Can there be any doubt, for example, that the appellate jurisdiction of this Court would encompass an asserted invalidity of an application of a state constitutional provision requiring segregation of the races in the public school system or one requiring legislative apportionment based on financial resources of voters above the age of forty? Appellant contends that the application by the court below of the uniformity clause in the Illinois Constitution is repugnant to the Fourteenth Amendment.

IV. APPELLEES' POINT I REFLECTS NO COMPREHENSION THAT THIS COURT TRADITIONALLY DECIDES CONSTITUTIONAL QUESTIONS RAISED BY CONCRETE APPLICATIONS OF STATE LAW RATHER THAN HYPOTHETICAL QUESTIONS RAISED FROM THE FACE OF THE PROVISION IN QUESTION.

At their 7 the railroads argue an irrelevancy, *i. e.*, Appellant makes "no claim . . . . that the state laws per se are repugnant to the Constitution or laws of the United States," and immediately follow the irrelevancy with a *non sequitur*: "Thus no grounds exist for direct appeal to this Court under Section 1257 (1) and (2) of the Judicial Code of 1948 [28 U. S. C. A., Sec. 1257 (1) and (2)]."

Appellant contends in support of jurisdiction that the application of the uniformity clause of the Illinois Constitution, valid on its face, to the facts of record has produced Supreme Court of Illinois judgments which, together with the application, are repugnant to the Fourteenth Amendment. Appellees overlook the settled law that "Appeal as of right may be taken to the Supreme Court in certain circumstances even though the particular state statute involved is valid on its face and would be immune to any attack in respect of its ordinary application. 'A statute may be invalid as applied to one state of facts and

yet valid as applied to another.'" ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 21, § 11 (2d ed. Wolfson & Kurland 1951) (footnotes omitted). In *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 289 (1920), the Court wrote, "That the statute was not claimed to be invalid in toto and for every purpose *does not matter* . . .," and sustained jurisdiction under the 1921 counterpart of 28 U. S. C. § 1275 (2). More recently, a railroad docketed an appeal from the Supreme Court of Tennessee and contended this Court's appellate jurisdiction was properly invoked because the state supreme court had applied a state law in such a manner as to conflict with the Fourteenth Amendment. The People argued that this Court had no jurisdiction because the statute was valid on its face. Consideration of jurisdiction was ordered postponed to the hearing on the merits. The Court sustained the railroad's contention and held there was jurisdiction, stating, "A statute valid as to one set of facts may be invalid as to another." *Nashville, C. & St. L. Rr. v. Walters*, 294 U. S. 405, 415 (1935). See Jurisdictional Statement 19. Indeed, Mr. Justice Black, Mr. Justice Clark and Mr. Justice Harlan have recently expressed concern about deciding the validity of hypothetical applications of enactments. *Brown v. Louisiana*, 34 U. S. L. Week 4143, 4153 (U. S. February 22, 1966) (dissenting opinion); *United Mine Workers v. Gibbs*, 34 U. S. L. Week 4343 (U. S. March 28, 1966) (concurring opinion).

The logical consequence of the traditional approach of the Court is that the first two of the questions presented at 7-8 of the Jurisdictional Statement, dealing with concrete applications of Illinois uniformity clause, more forcefully fall within the reach of Congressional provisions defining the appellate jurisdiction of this Court than would speculative applications of the uniformity clause not involved in the Record.

V. CERTAIN INELUCTABLE FACTS EMERGE FROM THE RECORD TO FRAME THE QUESTIONS PRESENTED.

1. The Directors of Revenue of Illinois, 1949-1962, ignored price level increases (inflation) both in equalizing locally assessed property and in assessing railroad property. See pp. 48-[illegible] *infra*.

2. The trial court, in order to enforce the state uniformity clause, at the instance of the railroads followed four prior Supreme Court of Illinois decisions, and in deriving levels of assessment rejected the Directors' elimination of price increases (inflation) in valuing locally assessed property; and at the instance of Appellant the trial court, in deriving levels of assessment, uniformly rejected the Directors' elimination of price increases (inflation) and property acquisitions in valuing railroad property, ordering a 25% refund. (Jurisdictional Statement A. 16-44.)

3. The Supreme Court of Illinois, in order to enforce the state uniformity clause at the instance of the railroads, reversed the trial court, holding in effect that railroad property valuations should not reflect price level increases and net property acquisitions, and ordering a 50% refund. See pp. 63-70 *infra* and Jurisdictional Statement A. 2-15.

4. The Supreme Court of Illinois, in determining valuations of railroad property *de novo* for the purpose of enforcing the uniformity clause, utilized the huge "judgment factor" reductions employed by the Directors in their assessments, even though there is no evidence to support these reductions, except for rationalizations, the validity of which is destroyed with data accumulated by the same administrative staff aid who offered the rationizations. See Appendix E, F, Jurisdictional Statement A. 51-2.

Paragraphs 1, 2 and 3 above frame the questions presented involving both the Due Process and the Equal Protection Clauses. Paragraph 4, the Due Process Clause alone. The verity of the contents of paragraphs 1, 2, 3 and 4, obscured by the railroads' Motion, is established at 48-70 *infra*.

VI. THE RAILROADS' CONTENTION THAT INFLATION HAS NOT INCREASED THE VALUE OF THEIR PROPERTY RESTS ON AN INARTICULATED PREMISE WHICH BEGS THE QUESTIONS PRESENTED; THE IRRELEVANT FACTUAL PRESENTATION OFFERED TO SUPPORT THE CONTENTION IS DELUSORY.

The railroads' thrust at 9-11 is that sustained price level increases for commodities and factors of production which constitute the inflation characterizing the economy since 1946 have not, despite increased investment and modernization, served to increase the value of railroad property. The assertion is in conflict with the facts.[21] The rail-

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[21] In n. 15 at 26 of the Jurisdictional Statement Appellant referred to an increase in the "book" value of railroad property of some 8.3 billion 1946-1961; however, that increase is only the amount of property additions after credit for retirements. Between 1956-1960 alone, capital investment by railroads in new plant and equipment amounted to 5.3 billion. Survey of Current Business, July, 1959, p. 30, Table V-7; September, 1961, p. 6, Table 1.

On March 4, 1966, Mr. Daniel P. Loomis, President of the American Association of Railroads since about 1958, told the National Defense Transportation Association's 3rd European Regional Conference in London about the "technological revolution" and the "pricing revolution" which have been taking place among the 76 major railroads of the United States. (The Association's [AAR's] members own 95% of the railroad mileage and carry 99% of the line haul freight and passenger traffic in the United States.) Mr. Loomis reported "our technological changeover is being fueled by a railroad financed capital improvement program that has involved $22 billion over the past two decades and has now reached a record rate. . . ." Address, "World Railroad Renaissance: Beacon Hope for the Transport Future," 112 CONG. REC. A. 1220 (daily ed. Mar. 7, 1966). Recently, AAR explained

roads' thrust is even deeper and more convoluted: the railroads argue that inflation and increased investment have not prevented the value of their property from decreasing since the mid and late 1950's. They contend that

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"The amount of capital spending by Class I railroads fails to portray the full magnitude of railroad modernization programs today, since much new equipment is being installed by railroads under leasing arrangements or is being put in service under private reporting marks. The total value of railroad plant and equipment placed in service in 1965, including that which does not show in investment accounts of Class I railroads, was probably close to $2 billion." Behling, A REVIEW OF RAILROAD OPERATIONS IN 1965 (AAR Special Series No. 100; L. C. Card. No. A28-130). Modernizing capital expenditures, not including those made by lessors and private car lines, for equipment and roadway and structures, 1950-1964, are set forth at 17 of YEARBOOK OF RAILROAD FACTS (AAR, 1965 ed.).

On January 13, 1958, Mr. Loomis told Congress, ". . . the fact that the railroads have made capital expenditures in the 12 years since the war [of] approximately $13½ billion, certainly manifests a determination to modernize and improve the railroad plant . . . These expenditures have brought about almost complete dieselization of the railroad system. They have brought in new push-button yards, extension of centralized traffic control, improved railroad beds, and communications, mechanization of construction and maintenance work; modernized rolling stock." HEARINGS ON PROBLEMS OF THE RAILROADS BEFORE THE SUBCOMMITTEE ON SURFACE TRANSPORTATION OF THE SENATE COMMITTEE ON COMMERCE, 85TH CONG., 2ND SESS., VOL. I, 31 (1958) (no significant assertion or concern that railroad property was being victimized by state tax administrations in managing the property tax.) For the sudden shift in railroad remonstrance see Appendix B, Map #3, at v *infra*.)

On January 15, 1958, Mr. H. C. Murphy, President of the Burlington Lines, which consists principally of Chicago, Burlington and Quincy Rr., one of the Appellees here, told Congress that from 1947-1956 his company's gross capital expenditures had reached $327,991,578 and the net cost of additions and betterments after credits for retirements was $226,805,574. Mr. Murphy referred to recent completion in Chicago of a modern classification yard with electronically controlled retarder and other improved yard facilities costing $4 million and a new freight house at Berwyn, Illinois, costing $3 million. *Id.* at 557.

A large percentage of the investment in railroad property has been put on the books since 1946. At year-end 1962 reproduction cost new of "road" and "equipment" property of Class 1 line-haul railways in the United States was $72,900,750,000, and reproduction-cost-new-less-depreciation was $45,349,838,000; original cost

the declining assessments of their property in Illinois 1957-1962 were at full value.[22] The inarticulated premise of the railroads is that the investment in and cost of their property, whether reproduction cost which uniquely re-

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(before depreciation and amortization) of "road" and "equipment" property was $32,862,427,000; the "present value" of "land and rights" was $1,887,046,000; working capital including material and supplies was $517,551,000. ELEMENTS OF VALUE OF PROPERTY USED IN COMMON-CARRIER SERVICE AS OF DECEMBER 31, 1962, CLASS I LINE HAUL RAILWAYS, issued by the Bureau of Accounts of the Interstate Commerce Commission. Peo. Ex. 72, IV Exhibits. The accumulated book depreciation and amortization at year end 1962 for the railroad property covered in the ELEMENTS OF VALUE was $8,552,005,812 of which $7,714,643,798 was for depreciation, producing an original cost less depreciation and amortization of $24,310,421,188. See TRANSPORT STATISTICS IN THE UNITED STATES 1962, 112. TABLE 158 (ICC publication).

The Bureau of the Census reports that the assessed value of locally assessed real property in the United States at year end 1961 was $282,000,000,000 and that the "estimated sales value," i. e., value based on inflated sales prices, was $970,000,000,000. U. S. BUREAU OF CENSUS, II CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES 25 (v/8). Thus the Bureau of Census estimated that real estate in the United States overall bore a level of assessment of 29%. State assessed rail property in 1961 was $6,427,000,000 according to the Bureau of the Census. *Id.* at Tables 2 and 25. Assume that there is approximately an amount equal to 10% of the state assessed rail property in locally assessed railroad property. The total assessed value of railroad property becomes approximately $7,000,000,000. Non-Class I Line Haul property is offset by railroad property in states where it is not subject to property taxation. There is significant indication that the level of assessment borne by railroad property in the United States in 1961 may reasonably be estimated at 29% if assessed value is related to ICC original cost less depreciation and amortization (7 billion related to 24 billion). See Appendix B at v *infra*. If the assessed value is related to inflated reproduction cost less depreciation, without regard to land and working materials, the level of assessment is 15.5% (7 billion related to 45 billion).

[22] During most of the period directly involved in this case, Illinois' state assessments of railroad property decreased, although the court below labeled them equal to "value." See Appendix E at A-51, Jurisdictional Statement. In only a few states have assessment standards been lowered since 1956. See Map #1, Appendix B at v *infra*. Despite increased investment, increased profits since 1961 and generally the same assessment standards, state assessments of railroad property have been drop-

flects inflation (and deflation), or original cost, which also reflects inflation during times of large capital expenditures, or "prudent investment," is not relevant or entitled to substantial weight in ascertaining the value of railroad property, even though inflated prices are deemed the exclusive determinant of the value of everyone else's property. A state supreme court justice once observed that "practical men" prefer to leave their "major premises inarticulated" but that "even for practical purposes theory generally turns out the most important." *Holmes,*

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ping throughout the United States since the mid and late 1950's. See n. 10 at 12 *supra*. In 1956 state assessments of railroad property subject to local general property taxation were $6,546,000,000 in 36 states. V U. S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS: 1957, TAXABLE PROPERTY VALUES IN THE UNITED STATES, Table 2, p. 23. In 1961 state assessments of railroad property subject to local general property taxation were $5,939,000,000 in the same 36 states. II U. S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES IN THE UNITED STATES, Table 2, p. 29. In 1962, for 35 of the same 36 states, state assessments of railroad property subject to local general property taxation were $5,568,512,000, and the 36th state's figure for 1961 was $138,000,000, producing an apparent $5,706,512,000. PRELIMINARY WORKSHEET TABULATIONS OF THE BUREAU OF THE CENSUS, based upon state-published sources. In 1963, in 35 of the same 35 states, state assessments of railroad property were $5,096,162,000, with the 1962 figure for the 36th state being $215,985,000, producing an apparent $5,312,147,000. *Ibid.* In 1964, 15 out of the same 25 states decreased state railroad assessments. *Ibid.* For example, West Virginia's 1963 state assessment of $322,504,000 was reduced in 1964 to $308,765,000,000. New Jersey's 1963 figure of $151,033,000 was reduced in 1964 to $148,448,000. All this has occurred during a time when the data shows state assessments of non-railroad public utility property moved upward, and property tax collections also moved upward. And between 1961-1962 (and 1963-1964) the annual percentage increase in expenditure for plant and equipment by the railroad industry was higher than for any other industry and about three times the average annual increase for all industries combined. SURVEY OF CURRENT BUSINESS, July 1959, p. 30, Table V-7; September 1961, p. 6, Table 1; March 1965, Table 1, p. 1. We call the Court's attention to the fact that the Bureau of Census has not attempted to measure the relationship between assessment and value of state assessed property. II CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES 9. See Appendix B at v *infra*.

The Theory of Legal Interpretation, 12 *Harv. L. Rev.* 417, 420 (1899). The railroads' premise is at the heart of the questions presented, and the railroads' Motion begs them. The railroads' premise is here displayed in a constitutional context in which non-railroad property is being valued exclusively by inflated "spot" sales prices, and the issue is one of uniformity and equal treatment.[22a] The railroads have persuaded the supreme court below to discriminate via **valuation** methodology while enforcing an anti-discrimination provision of the state constitution to enforce **equalization.** See n. 10 at 11 *supra.* See Appendix B at v *infra.*

At 11 the railroads state "It is obvious that whatever was happening to the remainder of the economy during this period in the general inflationary process following World War II, the railroads were not participants. Had inflation affected **railroad valuations**, it would have been reflected in the market prices of stock and bonds and capitalized income." First, this case does not involve "railroad valuations," but rather valuations of **railroad property**. Second, inflation, *i. e.*, inflation of the price level, was indeed reflected in the reproduction cost of their property and to a significant extent in the original cost of their property due to huge capital expenditures. Accordingly, lamentations about income and security values appear irrelevant, as they are when industrial taxpayers complain about low profits to the property tax assessor. The railroads' capitalized income and the market prices of their stocks and bonds did, in fact, increase 1946-1957, as did the reproduction cost of their property, yet state assessments of railroad property in Illinois did **not**

[22a] Mr. Justice Brandeis analyzed 363 rate cases decided during 1920, 1921, 1922, 1923 (to March 1) and found the determinations of value based on "spot prices" in only five. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Com., 262 U. S. 276, 289, 301 n. 14 (1923) (concurring opinion).

increase during that period. See, *e. g.*, Appendix F, G, at A-51, 52 of the Jurisdictional Statement. Moreover, the period since 1961 has been for the railroads one of steadily increasing net income and security prices, reflecting enhancements in value of railroad property which did not occur overnight and were therefore accruing 1946-1961, although not always reflected in earnings and securities data. Furthermore, temporary managerial ineptitude in pricing railroad services, thereby encouraging competition and causing a loss of business to competitors in an expanding market, would not appear to have deflated the value of railroad property. POOLE, COSTS—A TOOL FOR RAILROAD MANAGEMENT (1961) *passim* (Mr. Poole is a retired research expert for Southern Pac. R. R.). Also, capitalized income as an element of value for railroad property has been figured in Illinois after highly questionable deductions for federal income taxes and also for property taxes paid on non-operating property.[23] Finally, capitalized income is designed to measure value by predicting the income flow in the future, and accuracy of this measure is imperfect, particularly when the prediction is based on a period in the past, particularly if the period selected in the past is at low ebb in line with the general economy. Railroads will be producing income with the aid of their

[23] In 1955 Eugene L. Maynard, Director of Revenue's expert in charge of the Property Tax Division, Chicago office, stated: "From the point of view of getting at comparative values of common and utility property, I am inclined to believe that the income approach is suspect, unless it produces value in line with or above a good reproduction cost less depreciation analysis for a going concern . . . . In the case of common or locally assessed property the amount [income] capitalized is always before any allowance for income taxes. If we are attempting to find the value of all of the property owned or used by the utility, how can we disregard that part of the income produced by the property just because the government is going to exact an income tax from the corporation?" CAN THE VALUE OF STATE ASSESSED UTILITY PROPERTY BE COMPARED WITH THE VALUE OF LOCALLY ASSESSED PROPERTY? REVENUE ADMINISTRATION: 1955, p. 32 (published by the National Association of Tax Administrators). People's Second Brief 95-7B. II Ill. Sup. Ct. Rec. 88.

property, apparently in perpetuity. See *C&NW Rr. Co. v. Dept. of Revenue*, 6 Ill. 2d 278, 285-289 (1955) (Schaefer, J.). The facts marshalled by the railroads at their 9-11, even if relevant, are to say the least, misleading.[24]

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[24] At their 9-11 the railroads present only part of the picture in an effort to downgrade the value of their property. (1) They refer to Appendix D at their 47 mentioning 6 railroad transactions purporting to reveal Illinois assessments of railroad property equal to or more than selling price. What the railroads do not say, for example, is that the CB&Q transaction is based upon a formula computation of the "cost of acquisition" of 3% of the Burlington stock in a merger transaction between related companies made by a Burlington officer about two months before he testified, three years after the merger agreements were entered into, which computation, according to the witness, had nothing to do with the merger. The other five transactions, as presented by the railroads, have been shown to be misleading. Brief for Appellee, pp. 62-66, 73-79, People ex rel. Korzen v. CB&Q, 32 Ill. 2d 196, 204 N. E. 2d 760 (1965) (Cook County). Cook County's case was based on on analysis of twelve railroad transactions, 1948-1961, which show that the state assessments of railroad property were substantially less than full value. *Ibid, passim.* The Litchfield and Madison Railroad, a good part of which was in Madison County, and all of which was in Illinois, was acquired in 1957 by C&NW for $8,000,000; the assessment was $4,800,000.

(2) At 10 the railroads assert that their Appendix H at 50-1 "which presents an array of changes in assessments 1935-1960 for all railroads has not been questioned since its submission to the Illinois Supreme Court." The fact is that Appellant discredited Appendix H at 44-5 of their Second Brief in the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 88. Not the least significant aspect of the vulnerability of the display is the fact that the Appendix purports to reflect only Class I railroads, yet the number of Class I railroads significantly changed several times due to changes in classification standards, constantly increasing the number of railroads in the class.

(3) At 10 the railroads erroneously state that the scale used for Appendices I and J at 52-54 is "the scale in every instance . . . used in People's Exhibit No. 69," which is at 20 of People's first Brief. II Ill. Sup. Ct. 72. People's Exhibit No. 69 uses a vertical axis in units of $100,000,000, i. e., tenths of a billion, whereas railroads' Appendix I uses a vertical axis in units of $10,000,000, i. e., hundredths of a billion. The relatively infinitesimal scale was used by the railroads in their Appendix I in an effort to prove their assertion that the Directors of Revenue did not "hold the line" in railroad property assessment. The effort has been defeated by the numbers. See Appendix E of the Jurisdictional Statement at

VII. APPELLEES' DESCRIPTION OF THE RECORD REFLECTS MISCONCEPTION OF THE FUNCTION AND DUTY OF THIS COURT IN CONSIDERING THE FACTS UNDERLYING CLAIMS OF UNCONSTITUTIONAL ACTION, MISSTATES THE QUESTIONS PRESENTED, EMPHASIZES IRRELEVANCY AND MASSIVELY MISREPRESENTS AN IMPORTANT ASPECT OF STATE ADMINISTRATIVE HISTORY IN ILLINOIS.

The railroads are not content to obscure the small quantity of facts—indisputable ones—which frame the questions presented. See pp. 32-33 *supra* and 48-70 *infra*.

A-51. The scales on People's Ex. 69 and Railroads' Appendix J also differ.

(4) At 10-11 the railroads list some data supposedly showing "that the railroads did not participate in the benefits of inflation during the subject period." Appellant is uncertain that inflation in price levels always produces "benefits." In any event, the data requires amplification. In (a) they recite a decrease in mileage owned of about 3%, 1952-1962, which probably reflects in the main abandonment of unprofitable passenger operations.

In (b) at 10-11 they recite a decrease in freight cars "owned and operated" by Class I line haul railroads. Alfred E. Pearlman, President of the New York Central, one of the Appellees in the case at bar, has explained the misleading nature of such a presentation. The presentation overlooks the increase of average car capacity and increased efficiency in the utilization of cars which, despite a decline of cars "owned or leased" between 1926 and 1964, has produced an increase in revenue-ton-miles of about 48%: 443,700,000,000 in 1926 to 659,327,000,000 in 1964. In 1964 revenue ton miles for the first time exceeded the average annual revenue ton miles for World War II years. HEARINGS BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 89TH CONG., 1ST SESS., SER. 89-26, AT 140-152 (1965) ("RAILROAD FREIGHT CAR SHORTAGE"). Mr. Pearlman also told Congress that the New York Central system had expended $531,421,526 for freight equipment since 1956. Moreover, Daniel P. Loomis, President of the American Association of Railroads, has reported to Congress that the type of presentation made by the Appellees to this Court does not reflect the data on "serviceable cars" which have remained constant in number due to the increase in cars repaired and upgraded. Mr. Loomis reported in 1965

At their 2, 4, 7, 8, 9, they urge that the existence of some evidence in the Record supportive of the Supreme Court of Illinois' judgments below preempts plenary consideration by this Court of the constitutional questions.

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that the average capacity of cars placed in service was 77.82 tons while the average capacity of cars retired was 45.44 tons. "The large capital spending program, providing modern switching facilities, improved signaling, better communications, and advanced data processing systems has enabled the industry to secure better car utilization and more efficient transportation. Advanced operating and maintenance methods, such as better journal lubricating devices and hot box detection equipment, are reducing the time cars are out of service for repairs." Letter from Daniel P. Loomis to Oren Harris, June 18, 1965, *Id.*, 165. Further, it is clear that the cost of new cars is inflated, with the result that the investment in cars increased even though additions of new cars owned has been exceeded by old cars retired. HEARINGS BEFORE THE FREIGHT CAR SHORTAGE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 89TH CONG., 1ST SESS. (1965) *passim*.

In their (3) and (4) at 11 the railroads cite a decrease in passenger miles and equipment which simply reflects a decrease in losses effected by discontinuances urged by railroad leaders since the late 1940's. In any event, there is a dispute within the industry as to what costs should be charged against passenger operations. *Wylie, Railroad Passenger Service Needs Some Positive Thinking, XVII Michigan Business Review* 13 (January, 1965). Moreover, while passenger business is significant for certain carriers in the East, it is a relatively small item for most other railroads. The Eastern railroads in 1961 handled 70% of the total commuter business of the industry. EASTERN RAILROAD PROBLEMS—THEIR SERIOUS SITUATION AND ITS CAUSES. October, 1961 (a pamphlet in Bureau of Railway Economics Library, Rm. 1002, Transportation Building, 17th & H. Streets, Washington, D. C.). The C&NW has had excellent results from its suburban passenger operations. *Schiller, Chicago's Community Railroad Miracle, Harper's,* January, 1966, p. 37. People's Second Brief 62-64, II Ill. Sup. Ct. 88. In 1962 the C&NW's suburban business generated only 12% of its gross revenues. MOODY'S TRANS. MANUAL 1043 (1963). It has no other passenger business.

Appendix C at 5 of Appellees' Motion stops with 1961, but the actual exhibit on which it is based includes preliminary figures for 1962 showing substantial increases in business handled and in profit. Rr. Abst., Vol. II, p. 191. I Ill. Sup. Ct. 17. Mr. Loomis in 1965 confirmed that the 1963-1965 proportionate share of intercity ton miles handled by railroads increased over the proportionate share handled by trucks. HEARINGS BEFORE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 89TH CONG., 1ST SESS. 152 (1965) ("National Freight Car Shortage").

Constitutional duty and responsibility traditionally compel attention by this Court to the facts. Perhaps the clearest articulation of this principle has been rendered by Mr. Chief Justice Warren in *Napue v. Illinois*, 360 U. S. 264, 271-2 (1959):

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does on our solemn responsibility for maintaining the Constitution inviolate. . . . 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts but will examine the evidentiary basis on which those conclusions are founded.' It is now so well settled that the Court was able to speak in Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 121, of the 'long source of judicial construction which establishes as a principle that the duty rests upon this Court to decide for itself facts or constructions upon which federal constitutional issues rest.' [citing sixteen cases, concluding with a quotation of Mr. Justice Holmes in a seventeenth case decided in 1923.]"

Before 1923 Mr. Justice Holmes had written that "when the decision of the question of fact is so interwoven with the decision of the question of constitutional right that one necessarily involves the other, the Federal Court must examine the facts [citing two cases in which railroads advanced the point]. Otherwise, the right will be a barren one." *Frank v. Mangum*, 237 U. S. 309, 345, 347-8 (1915) (dissenting opinion). In two other cases arising from Illinois, Mr. Justice Stewart has implemented this principle. *Lynumn v. Illinois*, 372 U. S. 528 (1963), *Reck v. Pate*, 367 U. S. 433 (1961). Similarly Mr. Justice Black in *Ashcraft v. Tennessee*, 322 U. S. 143, 147-8 (1944) (this Court not foreclosed "by the finding of a court, or the verdict of a jury, or both"), Mr. Justice Douglas in *Gallegos v. Colorado*, 370 U. S. 49, 52 (1962) ("close

scrutiny of the facts of individual cases''), Mr. Justice Goldberg in *Hayes v. Washington,* 373 U. S. 503, 515-16 (1963) (''independent determination''), and Mr. Justice Jackson in *Stein v. New York,* 346 U. S. 156, 181 (1953) (''. . . else federal law could be frustrated by distorted fact finding'')—all have also announced the principle and implemented it. Moreover, at the instance of railroads, this Court has been moved to announce that ''any pretense or masquerade will be disregarded, and the true purpose . . . ascertained.'' *Smith v. St. Louis & Southwestern Rr.,* 181 U. S. 248-257 (1901). And, ''A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this Court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by use of some form of words, can take away our duty to consider its nature and effect.'' *Galveston, Harrisburg Rr. v. Texas,* 210 U. S. 217, 227 (1908) (Holmes, J.)

In stressing the existence of some evidence in the record to support the judgments appealed, the railroads reflect a misapprehension of the questions presented. Appellant is not seeking to have this Court find the values of the Appellees' properties. Two state courts below have done that already, the trial court and the Supreme Court of Illinois. Rather, the equal protection questions here involve mixed questions of fact and law—going to methodology, i. e., the validity of State action which, in applying uniformity mandates, excludes the influence of inflation and property acquisitions in the valuation of railroad property and simultaneously requires exclusive reliance on inflation in valuing locally assessed property. Similarly, the due process questions do not seek a determination by this Court of values but rather involve standards of proof.

Appellant, in fine, does not ask this Court to consider applying the Fourteenth Amendment so as to direct Illi-

nois how to value property for purposes of property tax uniformity. Appellant asks this Court to consider applying *Cumberland Coal v. Board*, 284 U. S. 23-25, 30-1 (1931) to the facts of this case. *Cumberland Coal* held that the Fourteenth Amendment prohibits arbitrarily and unreasonably disparate valuation methodologies applied to property for purposes of the property tax, and the judgments below are in conflict with it.

In this light, we invite the Court's attention to the verbiage of the Appellees. At 2 the railroads' opening gambit is to characterize the judgments of the Supreme Court of Illinois as ones which ". . . merely adjudicate questions of fact turning upon the analysis and consideration of **voluminous** testimony and exhibits. . . ." Voluminosity is both relative and irrelevant. Moreover, a substantial and detailed record can be helpful in the determination of substantial questions, as has apparently been recognized by some of the Appellees, *viz.*, Chicago & Northwestern Railroad, Gulf, Mobile & Ohio Railroad and Illinois Central Railroad (plus six other railroads) in *C&NW, et al., Appellants v. Atchison, Topeka & Santa Fe Railroad, et al.*, No. 159 on the Appellate Docket of this Court, *prob. juris. noted*, April 4, 1966 (consolidated with *United States et al. v. Atchison, Topeka & Santa Fe Railroad et al.*, No. 576).

The railroads at 9 ask this Court to regard "the presumption of statutory compliance" as sufficient support of the judgments below to warrant dismissal of the appeal or affirmance of the judgments appealed without plenary consideration. Appellant submits that use of a presumption of statutory compliance implies the absence of evidence, which even the railroads argue, with hyperbole, is not a condition of the record at bar. Cf. n. 2 at 2 *supra*. Statutory compliance is irrelevant. Relief for

the railroads does not turn on whether or not the administrator complied with a statutory provision. Indeed, a statutory framework per se could violate federal constitutional mandates, and compliance by the administrator with such statutory commands would not conclude the issue of validity. Here, the railroads' claim is **discrimination.** Suppose, in a full-value state, locally assessed property after state equalization bears a level of assessment of 50% and state-assessed railroad property, 75%. The state administrator has violated two statutory provisions; still, relief would appear indicated on uniformity grounds. Suppose locally assessed property bears a level of assessment after state equalization of 100% and state-assessed railroad property, 125%. Here, the administrator has violated the statute in assessing railroad property; still, relief would be indicated on uniformity grounds. Finally, locally assessed at 125% and railroad property at 150% would also warrant relief. The foundation of relief is not statute; it is constitution. The pertinent presumption, if any is needed, has been announced by this Court: "The **good faith** of such officers [state tax administrators] and the **validity** of their **actions** are presumed; when assailed the burden of proof is upon the complaining party. . . ." *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U. S. 350, 353 (1917). This presumption of "validity" includes compliance with constitutional duty and militates for reversal of the supreme court judgments below and reinstatement of the trial court's judgments.

Irrelevant preoccupation by the railroads in their Motion with alleged statutory compliance has moved the railroads to state at 9: "We further respectfully suggest that the record contains a great deal of creditable [sic] evidence directly and overwhelmingly establishing that the Department performed its function **in good faith and assessed the railroads' properties at their full fair cash**

valuations." Appellant denies that under the circumstances of this litigation assessment of railroad property at full value would constitute evidence of the Directors' good faith, assuming that "good faith" is relevant. Logically, if the Directors of Revenue acted in good faith, the railroads should be entitled to no recovery or at least mitigated recovery. The Supreme Court of Illinois has found that the Directors assessed railroad property at full value. The railroads contend this finding is evidence of good faith. Accordingly, the railroads should be entitled to no relief or at least less relief. Yet the railroads were granted by the supreme court below twice the relief that the trial court granted. In truth, **relief for the railroads is allied with railroad-alleged bad faith** on the part of the Directors, and the supreme court below found the Directors of Revenue twice as derelict as the trial court did and consistently awarded twice the amount of refunds. No verbiage can obscure the conclusion that in view of the Directors' equalizations of locally assessed property at less than full value, assessment of railroad property at full value would constitute evidence of **bad faith**. In truth, by arguing the converse of the obvious, the railroads give emphasis to a *reductio ad absurdum* produced by analysis which contemplates unrealistic segregation of two statutory duties of the same official, the Director of Revenue, (equalization at full value of locally assessed property and assessment of railroad property at full value), followed by application of detached, compartmentalized presumptions of statutory compliance. It is unrealistic to suggest that the administrative tax chief, the Director of Revenue, equalized locally assessed property and assessed railroad property without at the same time relating his actions between the two categories of property. It is also unrealistic to believe that the Director's policy in assessing railroad property (3-4% of the tax base) would have controlled his policy in equalizing lo-

cally assessed property (96-7% of the tax base). It is sensible to believe that his policy in equalizing locally assessed property controlled his policy in assessing railroad property. The data confirm the sensible. But see n. 2 at 2 *supra*.

At 11 Appellees state that with regard to railroad property "Cost Was Never Accepted as Reliable." We ask the Court to note that this language does not distinguish between original cost, reproduction cost or "prudent investment." Further, the supreme court below never explicitly rejected reproduction cost—only that influence of reproduction cost in valuation which reflected inflation and property acquisitions. See Jurisdictional Statement A. 10-12. The record is clear that the administrative process never rejected giving reproduction-cost-less-depreciation-and-obsolescence one-third weight in the formulaic average of the elements of value. The railroads' presentation at 11-15 in describing the use of reproduction cost by the administrative process in Illinois is rife with quotation out of context and represents a rewriting of history which, in attempting to bury cost of and investment in their property for purposes of property tax valuation, grossly belies the record. The record contains oral testimony and documentary reports about the administrative process confirming use of reproduction cost for decades. Appellant is constrained to pinpoint the intensely misleading nature of the railroads' unbalanced use of quotation interwoven with their textual offerings.[25]

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[25] The railroads have offered to this Court a presentation which repeatedly quotes administrative Reports out of context. A fair reading of the Tax Commission Reports reveals acknowledged defects in all the elements of value, not just in reproduction cost. For example, at 12 the railroads quote at length from their Abstract of the record to show that in 1933, the year when Illinois first employed economists who commenced rationalization of the property tax system, the Tax Commission "looked askance at reproduction cost as a reliable indicator of railroad

VIII. THE RECORD PROVES UNDENIABLY THAT THE DIRECTORS OF REVENUE OF ILLINOIS UTILIZED "JUDGMENT FACTORS" TO ELIMINATE THE INFLUENCE OF PRICE INCREASES ON PROPERTY VALUES BOTH IN EQUALIZING LOCALLY ASSESSED PROPERTY AND IN ASSESSING RAILROAD PROPERTY 1949-1962.

A. The Directors Ignored Inflation in Their Equalization of Locally Assessed Property 1949-1962.

At 6 the railroads misstate the Director's statutory "authority and responsibility" to increase local, *i.e.*,

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value while recognizing its usefulness in the allocation factor." Earlier on the same page of the Report (Peo. Ex. 34, p. 187, I Exhibits), which contains the first paragraph quoted in n. 6 at 12 of the Motion, is to be found this language:

> "These three methods of valuation ['appraisal of physical properties' based on either original or reproduction cost, capitalized earnings, and value of stock and lands] condition and limit each other so that a fourth method, which is a composite of the above or a weighing of the various factors previously enumerated, ought to be identified. The composite method rests upon the theory that true values can only be determined by a consideration of all of the elements above enumerated."

All the extant administrative data sheets prior to 1963 indeed evidence that reproduction-cost-less-depreciation-and-obsolescence was averaged with the other two elements of value.

In their n. 6 at 12, the railroads show three ellipsis marks at the end of the first paragraph instead of four and create the impression that the following two paragraphs are in the same context and same section. In fact, the first two quoted sentences are at the end of a section in the 1933 Report entitled "Determination of System Values," and the quoted text following the ellipsis marks is taken by the railroads from material five pages later in a section entitled "Allocation of Unit Values." The same misleading format characterizes Vol. II of the Railroads' Abstract at 281-82. Also, at 13, n. 7, the railroads use a quotation from the 1937-1938 Report which states that certain elements of value, not including "cost," caused a drop in assessments. The railroads imply the *non sequitur* that "cost" was not an element of value. The data indicates that the Tax Commission between 1933

county-wide assessments, to full value, reciting, "if local assessing officials fail to assess at full fair cash value, the Department of Revenue is **empowered** to certify to the county clerk an appropriate multiplier to raise the level

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and 1939 had been decreasing assessments, moving in the direction of giving cost less weight but no less than one-third weight in the valuation formula. See the statement of Raymond S. Danis in 1960 in n. 17 at 21-22 *supra*. At 13 the railroads state that the statute after 1937 did not require the use of reproduction cost in valuation. The fact is true but irrelevant. The fact is true also that the administrators did use it pursuant to their discretionary authority. See n. 31 at 59 *infra*.

The railroads state at 13 that the statute requires the use of reproduction cost "as a component of the formula by which the allocation factor is determined for the apportionment of income and stock and debt values." In fact, the allocation statute, quoted at 42 of the Motion, does not require the use of reproduction cost, providing discretion for substituting other factors. Contrary to the statements of the railroads at their 13, 17, the statute does not say that allocation formula shall be used to allocate only system income and security value but rather the "value of the entire operating property of such railroad."

Again the railroad is highly selective in quoting from the thorough discussion of railroad property assessment practices spread over fifty-three pages in the **1939-1940** Tax Commission Report (written by George W. Mitchell) (Peo. Ex. 38, I Exhibits). In the process the railroads distort meaning in the manner that the railroads' Abstract in multitudinous instances distorts the record. Quoting at 14 of their Motion from page 60 of the Report that there was contraction in the physical plant and falling off of earning capacity during the period 1920-1940, the railroads preceded the partial quote with reference to the impact of competition from other forms of transportation creating an undiluted cause and effect relationship. The railroads omitted the statement eight lines earlier at 60 of the Report that "severe depression" was also a causative factor. Also omitted by the railroads is the Report's statement 15-22 lines earlier that the railroads' rate structure had developed on the basis of what the traffic would bear, with little or no relationship to cost of service and thereby had "facilitated the development of other branches of the transportation industry." At 14-15 of their Motion the railroads quote misleadingly from 91-92 of the same Tax Commission Report, creating the impression that there was no valuation formula for railroad property in Illinois, suggesting that the Tax Commission's approach was essentially the same as Justice Butler's verbalization in a 1934 case decided by this Court, quoted by the railroads, namely, there is no rational approach to value, just unarticulated judgment which, if true, would pre-

of assessment of locally assessed property to 100% of value." In fact, the statute after, but not before, January 1, 1946, **required** the Director to do this. Jurisdictional Statement A46-47. Persisting in their inaccuracy,

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clude all judicial review of administrative property tax valuation. In the first place, the 1934 case was Rowley v. C&NW, 293 U. S. 102 (1934), and Justice Butler's opinion at 105-07 reveals heavy reliance on reproduction cost by the Wyoming administrative process. Second, the pertinent section at 91-99 of the 1939-40 Report is headed "Valuation," and the sub-headings are "Earnings" at 92, "Stock and Bond Value" at 96 and "Cost of Reproduction" at 98. The Report states at 98: "The Commission has considered, along with net earnings and stock and bond value, the cost of reproducing the property as a factor influencing its judgment as to the fair cash value . . ." At 99, "It [the Commission] has confined its consideration to reproduction cost of the current inventory of the property and for this purpose uses the inventory and price indices of the Interstate Commerce Commission. From the estimated cost of reproduction new is deducted an amount which represents accrued depreciation and, to some extent, obsolescence so that the result is an estimate of cost of reproduction of the existing plant in its present condition . . . . **There still remains a large gap between the cost of reproduction and the value indicated by earnings and the stock and bond method for a large proportion of the carriers, but disadvantages encountered in the case of other factors are to some extent compensated by the use of this factor . . . the Commission has utilized reproduction cost of the system and allocated it to this state in the same manner as the earnings and stock and bond values.**" See n. 32 at 60 *infra*. Peo. Ex. 38, I Exhibits.

Moreover, the railroads overlook the fact that the Tax Commission Report for **1941** and **1942** states at 3: "It should be emphasized in the first place that other factors than income are taken into account in arriving at railroad assessments; stock and debt valuations, as reflected in market quotations, and I. C. C. reproduction cost figures both are factors of great significance in reaching conclusions respecting the full, fair cash value of railroad property." Peo. Ex. 39; I Exhibits. In June 1947 the PRELIMINARY REPORT OF THE COMMITTEE ON RAILROAD ALLOCATION OF THE NATIONAL ASSOCIATION OF TAX ADMINISTRATORS, at Appendix B-6, stated: "Cost, in one or another of its aspects is a factor that properly deserves recognition in ascertainment of unit value." The Committee was composed of state administrators from twenty states, including Lynn A. Stiles of the Illinois Department of Revenue and former Illinois Tax Commissioner, George W. Mitchell, then a tax economist with the Federal Reserve Bank of Chicago.

In May 1949 the Revenue Laws Commission of the State of Illinois transmitted to the Governor a Research Report which

the railroads state at 16, ". . . there was nothing arbitrary in the giving [by whom, court or Director of Revenue?] of effect to the higher values measured by sales prices in the equalization process, as the statute **required,** in determining the county wide level of assessment."[26] The statute does **not** require that the Director's determination of the full value of locally assessed property for equalization purposes be based exclusively on current sales prices of real estate reflected in the studies of property transfers. The statute provides that the Director shall determine "estimated full, fair cash values established through the analysis of property transfers, property appraisals **and such other means as it [Department of Revenue] deems proper and reasonable** . . . " Jurisdictional Statement A-46.[27] Furthermore, Appellant has never stated

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had been prepared by its Technical Staff. At 41 this report stated: "The intangibles of the railroads are included, at least indirectly, however, in the valuation of the entire system. In the case of interstate carriers, a proper valuation of the total system valuation is assigned to Illinois. The system valuation of a railroad is based on earnings, market quotations on securities outstanding and reproduction cost."

The Supreme Court of Illinois, per Justice Schaefer, stated in 1955: "In arriving at its final assessment, the Department averages these three factors in the case of the plaintiff's property and the property of forty-five other railroad companies. This method was pursued prior to the enactment of the Revenue Act of 1939 and in each year thereafter." 6 Ill. 2d 278, 282.

[26] The railroads argue at their 16: "But, it does not follow that all other properties which sold were thus increased in value," in an effort to debunk the reflection of inflation in assessment-sales ratio studies. The observation of the railroads may be true but it is irrelevant. The ratio studies generally reflected the inflation in full force. See n. *27 infra.* That fact is precisely why the railroads argued to the Illinois Judiciary that they should be used as the sole determinant of value of locally assessed property. The Supreme Court of Illinois was persuaded by the argument.

[27] An assessment-sales ratio study involves an annual study relating (sometimes on a sampling basis, sometimes on a total basis) sales prices, for the year or shorter period under study, of real estate, mostly residential, agreed upon between buyers and

that to impute the value of locally assessed property exclusively from current assessment-sales ratios reflecting current prices is arbitrary. Appellant does contend that not to reflect, at least to some substantial extent, price increases in the valuation of railroad property at the same time is arbitrary and discriminatory. In stating at 15 that, "these official ratio studies reflected the level of assessments and equalized assessment of a given county [sic] for the year surveyed," the railroads are asserting an opinion which no Director of Revenue or staff aid has ever GIVEN in Court.[28] This quoted statement

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sellers in arms length transactions, with corresponding equalized assessments of the traded properties. The relationship of assessment and price for all measurable or sampled transactions in the jurisdiction studied are statistically combined and appropriately weighted to produce a ratio for each county and for the entire state. Assessment-sales data permit nothing more than the derivation of ratios. These ratios do not produce the "level of assessment" unless it is decided that current prices are to be the sole determinant of value. (The relation of two numbers known as the "level of assessment" connotes a knowledge of two facts: assessment and value.) Once the decision is made to base value solely on current prices, the ratio automatically provides the level of assessment, and the value of locally assessed property is automatically imputable from the ratio. Thus, if the locally assessed property assessment-sales studies produce a ratio of equalized assessment to price of 50%, and the sales prices alone are to determine value, then one need only double the equalized assessments in the county or state in question to arrive at full value. In the example, if equalized assessments of local property total $1,000,000, then the value of that property is $2,000,000 because assessments are 50% of sales prices.

[28] The railroads sponsored Eugene L. Maynard and Allan E. Garber, highly qualified administrators on the staff of the Directors of Revenue, who were asked by the railroads to describe the methodology of the assessment-sales ratio studies conducted under their supervision and to identify the ratios derived by them from the studies for Madison County for the period 1953-1962. They were not asked to express an opinion on the value of locally assessed property or railroad property. R. 332-352. I Testimony. On cross-examination Appellant established that the staff had developed assessment-sales ratios for locally assessed property in each county and then presented them to the Director who used his "judgment" and "determined" "equalization factors"

from Appellees' Motion assumes the answer to the important question of how to value locally assessed property for property tax purposes, and in Illinois the question was not answered in court until 1961 by the Supreme Court of Illinois in *Hillison* and *Kohorst* and then in a vein fundamentally different from what the Directors' answer had been since the late 1940's.

The Record makes clear, as the railroads proved and argued to the trial court, that the Directors of Revenue never estimated full value of locally assessed property by exclusive reliance on their staff's current assessment sales ratios derived from studies in the field.[29] If the railroads at 15

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to produce the county multipliers. R. 279-80, 284, 326, I Testimony. Mr. Garber testified that he did not know whether the Director considered the price level in determining the "equalization factors." The "equalization factors" actually determined by the Directors discounted inflated prices and were **not** based on the assessment-sales ratios. The "equalization factors" were higher than the assessment-sales ratios and therefore produced smaller multipliers which, when certified to Madison County, did not raise local assessments to the value imputable from the assessment-sales ratios. See pp. 55-58 *infra;* Rr. Ex. 15 at 4 of II Abstract. I Ill. Sup. Ct. Rec. 17.

[29] From 1946-1959, the statute did not mention "equalization factor," a term developed prior to 1946 when the Director of Revenue and the Tax Commission did not have the duty to equalize at full value. The statute, 1946-1959, required the Director to ascertain "the amount to be added to or deducted from the aggregate reviewed assessment on property subject to local assessment jurisdiction in order to produce a ratio of assessed to full, fair cash value equivalent to one hundred percent." People's Jurisdictional Statement A-47. The statute also provided that the Director should determine the "percentage relationship" between assessments and full value, "and certify to the several county clerks the percentage finally determined by it **to be added to or deducted** from the listed or assessed valuation." Appellees' Motion at 44. The statute appears to have contemplated certification to the counties of amounts of dollars needed to raise or reduce local assessments to full value. Instead, a given multiplier was certified to each county and then applied to each local assessment in the respective counties. Not until 1959, when the legislature froze "equalization factors" for four years, did it, of necessity, mention the "equalization factors." The re-

mean to state otherwise in writing, "The Department performed its equalization functions upon the facts disclosed by sales-assessment ratio studies," they misrepresent the Record. The railroads built the Record on equalization by the Directors of Revenue of locally assessed property. The record proves that the following published description of a disinterested scholar is correct:

> "It is significant that the department does not use the term 'assessment ratio' in its reports on inter-county equalization. Instead, the figures from which the percentages for the counties are computed are called 'equalization factors.' The equalization factor does not represent a true assessment ratio derived from a purely statistical analysis of the sales data. The equalization factor is computed through a formula which combines the use of sales data, appraisals and 'deflationary factors' which are designed to alter the results of objective market information on sales according to the judgment of the department as to what constitutes a 'correct' or 'actual' or 'reasonable' value. The department has not relied solely on sales data, sup-

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lationship between the "equalization factor" and the multiplier certified is crucial. The state-designated multiplier applied to local assessments was the "reciprocal" of the "equalization factor," a percentage relationship determined by the Director between local assessments and his determination of locally assessed property values for each county. The mathematical definition of a reciprocal of a number, not a percentage, is the quotient of 1 divided by the number. That is, the reciprocal of 2 is ½. The reciprocal of ½ or .50 or 50% is 2. The Director's "equalization factors" represented percentages equivalent to numbers, the reciprocals of which constituted the multipliers certified to the counties. If an equalization factor determined by the Director for a county was 100, the percentage was 100%, the number was 1 and the number's reciprocal was 1 and 1 was certified to "equalize" the local tax base. In Madison County the Director's equalization factor, 1958-62, was 100%, and the multiplier certified was 1. Yet the judiciary found the level of assessment of locally assessed property in Madison County at about 50%. See Rr. Ex. 15, II Abstract. I Ill. Sup. Ct. Rec. 17. The higher the equalization factor, the lower the multiplier.

> plemented by appraisals, during the time the Full-Value Assessment Program has been in force. They have not permitted the market data to 'speak for itself' so to say, but rather have 'adjusted' the results to suit their judgments as to 'real' values. Until 1948, the department published detailed yearly property tax statistics in which the actual assessment ratios were given along with a considerable amount of statistical analysis. However, no complete statistical analysis of the departments methods of computing its equalization factors has been made outside the department." Pealy, "A Comparative Study of Property Tax Administration in Illinois and Michigan," 99 (1956) (Bureau of Government, Institute of Public Administration, University of Michigan).

A clear description of how the Directors discounted current prices reflected in the sales studies in formulating "equalization factors" is contained in the Illinois Legislative Council Report of 1957. "Equalization of Property Tax Assessments" Peo. Ex. 1a, pp. 4-8. I Exhibits.

How did the Director derive the "equalization factors?" They are numbers expressing a percentage relationship between the local assessments and the full value of locally assessed property as determined by the Director for purposes of discharging his equalization duties. See Rr. Witness Weil at I Testimony 485. That is, if the assessments were 100 and the Director concluded that the value of the property was 100, the equalization factor would be 100; but if he found the value to be 200, his equalization factor would be 50. An equalization factor of 50 means that the Director determined the local assessments in a county were 50% of value. In short, the equalization factor was the Director's determination of the level of assessment of locally assessed property before the application of state-certified equalizing multipliers.

The record indicates that, except for the exceptional county where local assessors increased assessments closer to value, the Directors never significantly increased the equalization factors, implying that in their "judgment" value was not going up unless local assessors said so. For example, the multipliers certified to Cook County have not changed past the hundredth of a number since the late 1940's. (1.4) The record proves then that except for infrequent changes in local assessment policy, the Directors did not change the equalization factors significantly and, like most local assessors, ignored inflation. The multipliers, like local assessments, remained static.

What then was the relationship between the county ratios developed by the Director's staff in its sales studies and the Director's equalization factors? The Director simply was not controlled by these sales ratios in formulating his equalization factors. Assume a ratio, based on current sales prices, was 50%. Considered alone, it would compel a multiplier of 2 in order to raise local assessments of property to 100% of full value, assuming current price determines value. For Madison County in 1958, the staff's sales ratio was 51.49 but the Director's equalization factor was 100, producing a multiplier of 1. See Rr. Ex. 15, II Abstract 4, I Ill. Sup. Ct. Rec. 18. Clearly, the Director did not determine levels of assessment for locally assessed property based on ratios of assessments to value imputed from current prices.

The Director used "judgment" in deriving multipliers.

1. Railroad witness, Professor Rolf Weil, at R. 468-471: (I Testimony)

> The ratio of assessment to selling price developed by the staff in its studies for each county was "taken into the Director's office, and out of the director's office comes something called the equalization factor.

> What happens between the time it goes into the director's office and the time it comes out of the director's office is something which has never been written up, something which no one I suppose could exactly testify to except the various directors of revenue over the years. . . . There is a gap there. There is a jump that is made from the statistical data and the equalization factor . . . the director uses discretionary . . . authority. He uses judgment factors. It has been given names. Occasionally he has called it a judgment factor . . . they have called it all sorts of things. Inflation adjustment factor . . . [the multiplier] is usually less than it would have been on the basis of the ratio studies . . . ." (Weil stated that one of the arguments for interposition of judgment in the process which led from the sales ratios prepared by the staff to the equalization factor was a distrust of market value in time of inflation, and he condemned the argument as anathema to every economist he knew.)

2. Professor Weil in his 1953 article, People's Ex. 57, excerpted in Appellant's Additional Abstract at 57-66, II Ill. Sup. Ct. 71, and in full in I Exhibits:

> "There are two major reasons why the county assessment ratio, based on real estate sales during the latest assessment year, has not been employed as the equalization factor. . . . The second and in the opinion of the writer, unjustifiable reason has been the distrust of market value in time of inflation . . . policymakers have a tendency to take it upon themselves to temper the objective judgment of the market with their own subjective judgment. This can be accomplished by various averaging formulas, involving the county ratios for several years, and by the use of 'deflationary factors'. . . . During the short history of full value equalization in Illinois,

> a number of formulas have been used to determine equalization factors. . . . The Department stated in 1948 that 'the equalization factors announced for 1947 and the corresponding multipliers tend to discount today's inflated purchase prices . . .'' (pp. 160) ''. . . once the average assessment ratio is found [from the staff studies] it should be the equalization factor . . .'' (Peo. Ex. 57 at 157); see Stiles' 1949 memorandum on railroad property assessments. Peo. Ex. 112, in Appellant's Add. Abst. 86-7, II Ill. Sup. Ct. 71.

If determination of value of locally assessed property must be based on current sales prices, then the Directors of Revenue certified deflationary multipliers to the counties. Thus, on this hypothesis, as prices and values rose, the level of assessment of locally assessed property decreased because the equalized assessments on particular properties were not increased. I Testimony 478-482. The Directors of Revenue, deferring to local assessment policy, ignored price level influences, until the legislature in 1959 enacted a statutory requirement that existing ''equalization factors'' be frozen for four years.[30]

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[30] See n. 29 at 53 *supra*. For a description of state tax administrative failure to equalize local assessments at full value in Kentucky see Russman, et al. v. Luckett, et al., 391 S. W. 2d 694 (1965) (Court of Appeals). Railroad witness Rolf Weil's article, "Property Tax Equalization in Illinois," National Tax Journal 157 (June, 1953), which is in evidence, contended that from 1946-1950, based upon inflating prices, the full valuation of Illinois property increased from $22.9 billion to $35.7 billion, whereas the assessed values after application of the Director's multipliers increased from 20.8 billion in 1946 to 21.0 billion in 1947 to 22.4 billion in 1948 to 22.7 billion in 1949 to 23.1 billion in 1950. At 165 Weil presented a study revealing that if in 1950 the Director of Revenue had increased local assessments in the City of Chicago to full value, state aid to the Chicago's school districts would have been zero rather than the 6.7 million actually received, on the assumption that the legislature did not change the "qualifying rate." Peo. Ex. 57, I Exhibits.

B. The Directors Ignored Price Level Increases and Property Acquisitions in Assessing Railroad Property 1949-1962 Because They Were Also Ignoring Price Increases in Equalizing Locally Assessed Property.

The traditional Illinois formula used in "unit valuation"[31] of railroad property for property tax purposes averages three factors: capitalized earnings, market value of stock and debts, and reproduction cost-less-deprecia-

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[31] "The tax laws of Connecticut, Delaware, Maine, Minnesota, New York, Pennsylvania, and Rhode Island are inappropriate to application of the unit rule, while in practice this method is little employed in Massachusetts, New Hampshire, New Jersey, Texas, Vermont and Virginia." Preliminary Report of the Committee on Railroad Allocations 1 (1947) (National Association of Tax Administrators.) See Map #1, Appendix B at v *infra*. The "unit" method of valuing railroad property for property tax purposes, *i.e.*, valuing the multi-state railroad as a unit prior to allocation by the respective state tax administrators, has involved the use of capitalized earnings and market value of securities as measures of value in addition to cost of the railroad's property. Two principal reasons for the development of the unit system of valuation were to enable state authorities to tax movable property of railroad corporations doing business in a number of states and also to tax the value of intangible property in excess of the value of the "bare bones." The unit rule was not intended to eliminate the influence of cost of or investment in property as a measure of value. In Illinois the legislature in 1937 mandated consideration of the earnings and securities measures of value, but it did not mandate elimination of the influence of the cost of railroad property as a measure of value. The constitutionality of the 1937 legislation has never been tested. Elimination of the influence of inflation and property acquisition via the cost factor was mandated by the Supreme Court of Illinois in the judgments now challenged in this Court by Appellant, culminating five prior decisions, 1961-1965. Dogged refusal in 1958 of Raymond S. Danis to state that the purpose of the administrative "judgment factor" was to eliminate the influence of reproduction cost is at People's Second Brief in the Supreme Court of Illinois at 89-90. II Ill. Sup. Ct. Rec. 88.

Unit valuation requires allocation of system figures. A National Association of Tax Administrators committee in 1947 promulgated an allocation formula which would give proper weight to "terminal state" allocation as distinguished from "bridge

tion-and-obsolescence. "This method was pursued prior to the enactment of the Revenue Act of 1939 and in each year thereafter." *C&NW v. Dept. of Revenue*, 6 Ill. 2d 278, 282 (1955) (Schaefer, J.). The only one of these three factors which could reflect increases in the price level as rigorously as do assessment-sales ratio studies is reproduction cost **based on "spot" prices. ICC reproduction cost**, utilized in Illinois, is based upon **"period"** price multipliers applied by the ICC's staff to the up-to-date inventory records of the carriers. These price indexes, based on period prices, not spot prices, are in the record for 1914-1962 as Peo. Ex. 370, III Exhibits. There are separate index numbers for each road account and each equipment account. The application of these inflating indexes based on "period" prices caused ICC reproduction cost to shoot upwards 1946-1960. See Appendix B at v *infra*. Appellees' Motion at 16-17 reflects misapprehension about the derivation of reproduction cost in Illinois despite the record.[32]

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state" allocation. Illinois is a "terminal state," but has never adopted the NATA formula. Appellant's Second Brief in the court below. II Ill. Sup. Ct. Rec. 88 at 168-69B.

[32] See n. 25 at 42 *supra*. The railroads' motion reflects misconception of the method by which the reproduction cost figure in the Illinois valuation formula has been derived. Generally, this cost figure is derived by allocating for Illinois a percentage of the ICC figures. See the Tax Commission Statement at n. 25 at 50 *infra*. The property tax returns filed by the CB&Q and the C&NW, which are in the Record for 1957-1962, are confirmatory. The allocation factor applied to system reproduction cost is different from the average of a multi-unit allocation factor developed for the purpose of allocating to Illinois portions of system capitalized income and system market value of securities. Reproduction cost data has been kept by the ICC staff for "Road" and "Equipment" property. It is clear that the reproduction cost of equipment, of necessity, is not allocated on the basis of situs as otherwise indicated by the railroads at 6, 17. Moreover, the record does not support the statement that the reproduction cost of "Road" property in Illinois was determined on a "situs" basis; rather, it appears that such data has been allocated for Illinois from system reproduction cost for

That price level increases inflated the formulaic averages markedly after 1946 is incontrovertible. Net property additions had the same effect. During a substantial part of the period 1946-1962 all three formulaic factors increased; during the last six years of the period, cost leveled off and the other two factors decreased. The assessments never changed to reflect the price level increases and property acquisitions. The technique for accomplishing the result was the "judgment factor." Appendices E, F, A 51-2, Jurisdictional Statement.

Obscuring the elimination of price level increases in equalizing locally assessed property, the Directors and their aids saw themselves unable to admit the purpose of the judgment factor reductions in railroad property assessments. The staff man "in charge" of railroad assessments, 1949-1960, Raymond S. Danis, pressed by the railroads, rationalized the "judgment factor" as an element of value; the rationalizations are demolished by the data. People's Second Brief 80-92, II Ill. Sup. Ct. Rec. 88. At 17 the railroads state that "Koncel . . . testified unequivocally that the railroad assessments were at full fair cash value." But Koncel, who joined the staff in 1960,

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"Road" property. The Record proves that Illinois' "Supervisor of Railroad Assessments" had an exceeding small staff, which could hardly have dealt with the physical properties of the sixty railroads if they were to have been ascertained on a situs basis. Appellees' statement at 17 that "Economic obsolescence is not adjusted out of the reproduction cost factor before its use in the formula" is inaccurate. The record is clear that pre-formulaic reductions were made by the Director's staff to the ICC cost figure for "uneconomic property," commencing in 1952, and in some cases for "obsolescence", commencing in 1957. The inaccuracy of the railroads' presentation is increased by its assertion at 16-17 that "unit" valuation in Illinois includes "funds involved in operations and all other operating personal property." The record is clear that the Director did not include working capital and materials and supplies. See Ill. Rev. Stat. c. 120, §§ 561, 560 (2); City of Alton v. Ill. C. C., 165 N. E. 2d 513, 518-19 (1961); 304 S. W. 2d 297, 300 (1957) (Ark.).

did not determine the assessments in 1961 and 1962; he performed the arithmetic. The assessments were determined by one of his chiefs, the Deputy Director of Revenue, a non-lawyer and former nationwide tax representative of Sears-Roebuck & Co., who later as a Director of Revenue, candidly testified for Appellant:

> "As I said before, for 1961 and 1962, we determined what we thought, in order **to hold the line**, a full, an **assessed** value for all railroads in the State of Illinois . . . in 1961 . . . **the judgment factor was varied in the railroads so as to arrive at a billion thirty two million. In 1962 we determined the overall value to be 990 some million, and again we varied the judgment factor for the railroads to arrive at 990 some million** . . . . Well, that was the easiest way out . . . . Keep it about the same as it was the year before . . . my thoughts had nothing to do with how much the railroads were earning or what their earnings should be, could be . . . **Mr. Dobbs, I am sorry. If I am going to be truthful, it was an arbitrary decision [to reduce industry assessment 4%].**" Appellees' First Brief 62-64, II Ill. Sup. Ct. Rec. 72; II Test. 1072-73, 1086, 1090, 1091, 1095, 1100-01, 1104; People's Second Brief 57 n. 16, II Ill. Sup. Ct. Rec. 88.

Mr. Koncel was asked by Appellant's counsel, "Now **was your approach** to the valuation procedure—strike that—was your approach to the valuation procedure in 1961 and '62 **essentially the same as Mr. Danis's**?" To which, Mr. Koncel answered, "**That's right.**" R. 2549. IV Testimony.

The ineluctable numbers figured by Mr. Danis and Mr. Koncel establish that the effect of the judgment factor reductions was to eliminate the influence of inflation and property acquisitions in the assessment of railroad property, 1949-1962.

IX. IN DETERMINING PROPERTY VALUES FOR CONSTITUTIONAL PURPOSES 1961-1965, THE SUPREME COURT OF ILLINOIS REJECTED ADMINISTRATIVE "JUDGMENT FACTORS" ELIMINATING INFLATION IN STATE EQUALIZATION OF LOCALLY ASSESSED PROPERTY AND SIMULTANEOUSLY EMPLOYED ADMINISTRATIVE "JUDGMENT FACTORS" ELIMINATING INFLATION AND PROPERTY ACQUISITIONS IN STATE ASSESSMENT OF RAILROAD PROPERTY.

"The court did not mandate the following of inflationary trends." (A one sentence paragraph at 15 of Appellees' Motion.)

The two paragraphs immediately following this statement at Appellees' 15-16 suggest that the sentence is referring to valuation of locally assessed property. If the suggestion is accurate, the sentence is a canard. If, however, the sentence refers to railroad property valuation, it is a half-truth because the court below did much more than that; it mandated that reliance on inflation in railroad property valuation is prohibited by the state constitution. See pp. 67-68, *supra.*

Prior to the decision of the trial court in August 1964, on full records pertinent to the issue the Supreme Court of Illinois had rejected the multipliers certified by the Director of Revenue and mandated that the value of locally assessed property must be based exclusively on the valuation to be imputed from the county-wide ratios developed by the Director's staff from the assessment-sales ratio studies. On March 29, 1961, the supreme court below first found the Directors' equalizations "arbitrary," having failed to increase local assessments to full value. *People ex rel. Hillison v. CB&Q,* 22 Ill. 2d 88, 96-98, 100-01 (1961); *People ex rel. Kohorst v. GM&O and C&NW,* 22 Ill. 2d 104, 109-12 (1961). The

court below held in those two cases that the valuation of locally assessed property must be imputed from the county-wide ratios developed from the staff studies of the Department of Revenue, and that the equalized level of assessment therefore was not greater than 50-55%.[33] Next, on May 27, 1963, the court below rejected criticisms of the assessment-sales ratio studies of the Directors' staff as a reliable determinant of value and gave a detailed description of the methodology. *People ex rel. Wenzel v. C&NW*, 28 Ill. 2d 205 (1963). On November 26, 1963, the court again required that valuation of locally assessed property be determined by imputation from the Director's staff's sales ratio and therefore found the equalized level of assessment at not greater than 55%. *People ex rel. Enrietta v. GM&O*, 29 Ill. 2d 605, 609-611 (1963). These four cases set the stage for the trial of the case at bar.

In light of the prior four cases and the soundness of the economic theory underlying the four prior decisions anent valuation of locally assessed property, the trial court below found value of locally assessed property by imputing it from the Director's staff's assessment-sales county-wide ratios which the railroads sponsored, and found levels of assessment accordingly. See Jurisdictional Statement A. 24-26. Appellant did not appeal this finding because Appellant believes it is correct.

In *Hillison, Kohorst, Wenzel* and *Enrietta,* the supreme court below confronted records which did not explain the Director's methods of equalizing locally assessed prop-

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[33] In *Hillison* the court below at 97 referred to "the U. S. Census Bureau study of the proportion of Illinois assessed values, as equalized, to full, fair cash values, ascertained through sales prices during the first six months of 1956." The Bureau's studies impute value of locally assessed property by relating 1956 "spot" prices of real estate to corresponding assessments. U. S. BUREAU OF THE CENSUS, V CENSUS OF GOVERNMENTS: 1957, TAXABLE PROPERTY VALUES 1; II CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES 1. Peo. Ex. 58, I Ill. Sup. Ct. Rec.

erty nor did the records explain that in equalizations of locally assessed property the Directors were ignoring inflation. The prior decisions never mentioned "price" and no Director of Revenue had testified. In the case at bar, an informative record on this point was developed, the first and only such record to reach the supreme court below.[34]

The four prior records contained the "assessment sheet data" concerning one or two railroads for only a small number of years and the testimony of Raymond S. Danis, the Director's "Supervisor of Railroad Assessments," that the assessments of the property of the two or three railroads for the one or several tax years at issue were at 100% of value. In *Hillison* the court below noted: "There being no evidence in the record to overcome presumption that the Department complied with the law [the statute] in assessing railroad property, even though it departed from the law [statute] in equalizing other property, [no mention of constitutional requirements of uniformity and related presumptions of administrative compliance] the trial court was warranted in finding the defendant's property was assessed at 100% of its full value." 22 Ill. 2d 88, 102. "There is no evidence in the Record to overcome

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[34] People ex rel. Korzen v. CB&Q, 32 Ill. 2d 554, 209 N. E. 2d 649 (1965) (Cook County) (tax year 1957), and the instant case were argued before the Supreme Court of Illinois on the same day, March 18, 1965. II Ill. Sup. Ct. Rec. 73. The railroads' reply brief in the instant case was filed on April 6, 1965. *Id.* at 84. The People's responsive brief was filed in the Madison County case on April 20, 1965. *Id.* at 88. On May 7, 1965, the railroads' "Motion to Strike the People's Second Brief" was taken with the case. *Id.* at 153. On May 20, 1965, the Court's opinion in the Cook County case per Justice House was filed, and on June 24, 1965, the Court's opinion in the instant case, per Justice House, was filed. Cook County's case was based on the contention that railroad transaction prices rebutted the statutory presumption of full value assessment. The Abstract of Record and the issues argued did not involve the equalized level of assessment of locally assessed property in Cook County. In his brief, the Appellee in *Korzen* did not emphasize constitutional questions argued by the Appellant in the Madison County case now before this Court.

the presumption [statutory] and the proof, and we must conclude that objectors' property was assessed at 100%." *Kohorst* at 22 Ill. 2d 104, 109. See n. 2 at 2 *infra*. In *Wenzel,* the People did not argue railroad valuation. In *Enrietta* the court wrote that "judgment must be used by appraisers in the intricate problem of arriving at an assessed valuation of a railroad," 29 Ill. 2d 605, 608. The previous records did not include the data sheets which prove that the effect of the "judgment factor" was to eliminate the influence of price level increases and property acquisitions in assessing the property of Illinois railroads.

The trial court in the case at bar on an adequate record rejected both the Directors' "equalization factors" vis à vis locally assessed property and the "judgment" (or "equalization") factors used by the Director in assessing railroad property. Relying on the data, the trial court determined the values and derived levels of assessment accordingly. Perceiving that the Directors of Revenue had ignored price level increases across the board, the trial court wrote:

> "Ordinary taxpayers' property may be taxed at full market value based upon cost (a sale item) though it may never have any income producing value and though ownership equity (stock and debt) is not even ascertainable. The result of this disparity may be that a tax law is substantially mitigated in favor of the railroad taxpayer by use of the income and market factors. Such an analysis may not call for the relationship of the income and market factors, but it does tend to warrant the ⅓-⅓-⅓ straight average as stressed by the witness, Cohen." Jurisdictional Statement A. 29-30.

With deference we submit that the issue decided by the Supreme Court of Illinois was not, as stated at Appellees' 7, simply "whether the railroads' properties were

assessed at full, fair cash value for the years in question." The issues emerging from the record and now before this Court are more sophisticated, as Appellant's Briefs and Petition for Rehearing below, the Jurisdictional Statement and this Brief suggest. Confronted with an adequate record on both the Director's equalizations of locally assessed property and assessments of railroad property, the supreme court below in reversing the trial court articulated its position on the Directors' uniform elimination of the price level increases in valuing state assessed railroad property. Mandating deflated valuations of railroad property which reflected no influence of inflation and capital expenditures of the past sixteen years, and deriving 100% levels of assessment, the Supreme Court of Illinois quoted a railroad witness for support:

> "He [H. Clyde Reeves] testified that if a formula incorporated Interstate Commerce Commission valuations as substantial indices of value, that a substantial judgment factor must be used 'to get them out.'" Jurisdictional Statement A-11.

No mention was made of exclusive reliance on inflated price levels in valuation of non-railroad property which had been mandated by the trial court in the same case, obeying the mandate of its four prior decisions.

The *deus ex machina* of the Supreme Court of Illinois' one-sided elimination of the influence of price level increases and property acquisitions in railroad property valuations to implement judicially determined equalization has been the "judgment" of Raymond S. Danis, the Director of Revenue's "Supervisor of Railroad Assessments," 1949-1960. Yet, in 1950, when the Director perhaps hoped that inflation would subside,[35] Mr. Danis had stated:

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[35] Cf. ". . . now we seem to be at the place where property taxes are continuing to increase whereas prices have leveled off or possibly declined in some cases." Maynard, "The Illinois Program

> "Our court and state statutes have dictated[?] that judgment should play a very important role in the assessment process; however, this judgment should be based on **objective** standards. In other words, **our judgment should have some scientific basis.**" ASSESSMENT ADMINISTRATION: 1950, p. 152 (National Conference of Assessment Administrators) (in Library of Congress).

By way of justifying judicial reliance on amorphous "judgment" in the valuation of railroad property, the court below also utilized purported language of Justice Holmes about "tangled impressions" **in the valuation process.** Jurisdictional Statement A-6. The Appellees utilized the same quotation at 14 of their Motion to suggest that the state tax administrators in Illinois have relied upon the "tangled impressions" approach to valuation. The quotation has been used twice out of context, once from the 1907 *Babcock* case and once from the 1939-40 Tax Commission Report. The Appellees fail to convey accurately Justice Holmes's and the Illinois tax administrators' respect for facts.[36] In rejecting the influence of price level

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of Equalization," Proceedings of the 42nd National Conference of the National Tax Association 272 (Sept. 1949) (Chief of Property Tax Division, Chicago office, of the Illinois Department of Revenue). See Appendix B at v *infra*.

[36] The railroad sponsored explanation of the administrative "judgment factor" reduction is set forth at their 17 n. 9 without mention of the underlying administrative data set forth at Appendix E of the Jurisdictional Statement A-51 which prove the explanation to be nothing more than rationalization. The opinion of the court below quotes Justice Holmes as follows:

> "All through the process of determining an assessment the necessity for utilizing judgment arises, and in the final summary the tangled impressions act directly on the result. (The term 'tangled impressions' **refers to Mr. Justice Holmes' description of the process of arriving at valuations** in Chicago, Burlington & Quincy Railroad Co. v. Babcock, 204 U. S. 598, 51 L. Ed. 636, where he said, 'They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie

changes, and in relying on "judgment" for purposes of property tax valuation of railroad property, the opinion of the court below is in direct conflict with its earlier decisions involving rate base valuation of utility property.

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beneath consciousness with and losing their worth.')" (Jurisdictional Statement A-6).

Justice Holmes' 1907 language was not a reference to **valuations** of property, but rather to allocations of value already determined between constituent parts of a railroad system. What the Justice actually wrote was:

> "Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the Court, and we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, **such as the distribution of the total value set upon the Chicago, Burlington and Quincy System, among the different roads making it up.** But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition . . ."

At 14-16 the railroads quote Justice Holmes's statement out of context from the 1939-1940 Annual Report of the Tax Commission, just as they represented it in their Abstract for the supreme court below. In fact, the quote is from a discursive pro and con discussion of the formulaic approach to valuation of railroad property, which concludes with this subsequent language overlooked by the railroads at 92 of the Annual Report for 1939-40, I Exhibits:

> "With all its shortcomings, **a good formula will produce results having advantages which far outweigh the disadvantages that an undocumented judgment brings about.** It lends a certainty and definiteness to the assessment process which safeguards not only the tax administrator but the taxpayer as well . . . as long as the rules governing the use of a formula are uniformly applied, any modification of the result can be limited to a consideration of **evidence** not taken into account in the formula."

The repeated misuse of Justice Holmes's 1907 statement obscures Justice Holmes's respect for the facts in constitutional litigation. In his dissent in Lochner v. New York, 198 U. S. 45, 76, he had stated: "General propositions do not decide concrete cases." On May 26, 1919, about three years after Justice Brandeis' accession to the Court, Justice Holmes wrote to Sir Frederick Pollock:

> "Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk

E. g., Illinois Bell Tel. Co. v. Ill. Com. Co., 414 Ill. 275 (1951).[37]

X. APPELLANT REQUESTS PLENARY CONSIDERATION OF QUESTIONS INVOLVING FOURTEENTH AMENDMENT EQUAL PROTECTION LIMITATIONS DEVELOPED AT THE INSTANCE OF THE RAILROADS.

In 1907, at the instance of Illinois utility taxpayers, this Court announced: "The claim that the action of the State Board of Equalization [Illinois] in making the assessment

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about improving your mind, you only exercise it on the subjects with which you are familiar, why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have no doubt that it would be good for my immortal soul to plunge into them, **good also for the performance of my duties,** but I shrink from the bore." Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock, May 26, 1919, in *II Holmes—Pollock Letters* 13-14 (Howe ed. 1946); Letter from Justice Oliver Wendell Holmes to Lewis Einstein, May 22, 1919, in *Holmes-Einstein Letters* 187 (Howe ed. 1964) ("I hate facts, but I feel as if it might be a solemn call to duty. We shall see. . ." in referring to Justice Brandeis' suggestion mentioned in the letter to Pollock four days later.)

[37] In Illinois Bell, the Supreme Court of Illinois formulated standards of value of property for rate making purposes at the instance of the utility. Following the onset of inflation after World War II, the court below held that the Illinois Commerce Commission must "take into account current economic conditions, present price levels, and reproduction costs," and reversed the decision of the administrative body **which had made a "judgment estimate" excluding the influence of current price levels and reproduction cost from rate base value.** The Court stated **"It [the judgment estimate] is supported by no evidentiary findings and has no basis in the record of the case."** See also City of Alton v. Ill. Com. Com., 165 N. E. 2d 513, 517 (1960) where the Supreme Court of Illinois affirmed the Circuit Court of Madison County, per Judge James O. Monroe, Jr., the trial judge in the case at bar, who had reversed the Illinois Commerce Commission for failure to require specific evidence supporting the overhead factor in the reproduction

. . . would violate the provisions of the Fourteenth Amendment . . . by taking property of the appellee without due process of law, and by failing to give it equal protection of the laws constitutes a Federal question **beyond all controversy.**" *Raymond, Treasurer of Cook County, Illinois v. Chicago Union Traction Co.*, 207 U. S. 20, 35, 42 (1907) (tax year 1900).[37a] Subsequent confirma-

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cost valuation finding, *i. e.*, the Judiciary rejected an administrative "judgment factor" inflating property valuation. See also CB&Q v. Dept. of Revenue, 17 Ill. 2d 376, 383-4 (1959) where the court refused to accept testimony by the "railroad assessor" that the proper rate for capitalizing income was 6%, writing "the basis for its [Department's] findings are not subject to evaluation. We cannot determine the proper rate of capitalization .... If capitalized earnings are to have relevance as an indicia of value, a 'judgment' reduction in the final assessment is no answer." In 1955 the court perceived the "judgment factor" utilized by the tax administrator in reducing the elements of value, and commented: "The record does not disclose the basis for these reductions, either in the plaintiff's case or in the case of other railroads." *Id.* at 6 Ill. 2d 278, 289.

The railroad industry uses reproduction cost to value equipment for computing damages to property and some railroads use it to boost the value of equipment so as to justify argument to Congress that there should be higher per diem charges for car rentals (even reproduction cost of "modern type car replacement" rather than of "replacement in kind"). See "Interchange Rules" of the AAR, Rule 112, Section A; Hearings before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess. (1961). Apparently, the last decision of this Court on railroad property valuation for property tax purposes is Great Northern Ry. v. Weeks, 297 U. S. 135, 139 (1936). The opinion of the Court, per Mr. Justice Butler, stated: "The principles governing the ascertainment of values for the purposes of taxation are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation." Rowley v. C&NW, 293 U. S. 102 (1934) (Butler, J.), cited by railroads at 15, reviewed federal court action which had interfered with state administrative distribution of the property tax burden and reversed the lower court, leaving the administrative distribution of the property tax burden intact.

[37a] The interpretation of the Fourteenth Amendment as a proscription of property tax discrimination resulted from railroad argument. Leading up to the 1907 declaration of this Court, that the interpretation was "beyond all controversy," was a line of cases in which railroads urged the application of the Fourteenth Amendment against state action. County of San Mateo v. So. Pac.

tion of limitation was elicited from this Court by railroad taxpayers in *Greene v. L&I Rr.*, 244 U. S. 499, 502 (1917); *Southern Rr. v. Watts*, 260 U. S. 519, 521, 525-6 (1923); *Chicago Rr. v. Kendall*, 266 U. S. 94, 95 (1924); *Nashville C&St.-L. Rr. v. Browning*, 310 U. S. 362 (1940). The limitations have also been confirmed at the instance of non-railroad taxpayers. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 353 (1918); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446-7 (1924); *Cumberland Coal Co. v. Board*, 284 U. S. 23, 24-5 (1931); *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 245 (1931); *Hillsborough v. Cromwell*, 326 U. S. 620, 623 (1945); *Waters v. City of St. Louis*, 374 U. S. 231, 237 (1954). As Mr. Justice Fortas recently observed, "Its [the Fourteenth Amendment's] sole office was to impede state regulation of railroads or other corporations. . . . See Stampp, The Era of Reconstruction" *United States v. Price*, 34 U. S. L. Week, 4313, 4317 n. 9 (U. S., March 28, 1966). See also *Graham, Builded Better Than They Knew: Part 1: The Framers, the Railroads and the Fourteenth Amendment; 17 U. of Pitt. Law Rev. 537 (1956)*. SWISHER, STEPHEN J. FIELD 250-61, 415-16 (Archon Books ed. 1963).

The questions presented will, if decided by this Court, further the interest of the railroads as well as Appellant's

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Ry. Co., 13 Fed. 722, 733-38 (Field, Circuit Justice, 1882), dismissed per stipulation, 116 U. S. 138 (1885); County of Santa Clara v. So. Pac. Rr., 18 Fed. 385, 390 (Field, Circuit Justice, 1883), aff'd on other grounds, 118 U. S. 394 (1886); Bell's Gap Rr. v. Pennsylvania, 134 U. S. 232 (1890); Railroad and Telephone Companies v. Board of Equalizers, 85 Fed. 302, 317 (C. C. M. D. Tenn. 1897) (tax biennium 1897-99); Nashville & St. L. Rr. v. Taylor, Governor, 86 Fed. 168, 179 (C. C. M. D. Tenn. 1898) (tax biennium 1897-9); cf. Taylor, Governor, v. L. & N. Rr., 88 Fed. 350, 362 (6th Cir. 1898) (Taft, J.); Louisville Trust Co. v. Stone, 107 Fed. 305, 306 (6th Cir. 1901) (Day, J.); Coulter v. L. & N. Rr., 196 U. S. 599, 609 (1905) (tax year 1902). "From the low level of 1897 they [prices] rose 21 per cent to 1900. . . . In the Bureau chart the 1913 prices are taken as the datum line (100). As compared with them the 1897 level was 67, the 1900 level 81." Mr. Justice Brandeis, concurring in Southwestern Bell Tel. Co. v. Mo. Pub. Serv. Com., 262 U. S. 276, 289, 303 n. 15 (1923).

interest. Reversal of the judgments entered by the Supreme Court of Illinois will reinstate the trial court's judgments, which also grant relief to the railroads. The predicate of Appellant's position is that the Fourteenth Amendment requires that the railroads (and other taxpayers) shall have relief from substantial discriminatory taxation; but at the same time the fact of discrimination, its substantiality and its precise extent must, if determined by the Judiciary, derive from rational evidence and reasonably uniform valuation methodology. Appellant submits that the filing by the railroads of their Motion to Dismiss or Affirm, and its tenor, permit the inference that they seek at the hands of the Judiciary something more than uniformity, something more than equal protection.

Appellant submits that focus on the questions presented is sharpened by consideration of the nature of the case. This case is not one in which the level of assessment of state assessed property is agreed between the parties or conceded by public officials. This case is not one involving an appeal from an administrative agency, or one involving injunctive relief against certification of a state assessment or one involving injunctive relief against the collection of taxes. In all such situations, if relief is granted, the Judiciary need not find the amount of discrimination, but need only find that discrimination existed to a substantial degree. This case is not one in which the state judiciary denied relief to the taxpayer. This is not a case in which the trial court denied relief and the supreme court of the state reversed to grant relief. Rather, this case is one in which the Supreme Court of Illinois reversed and doubled the relief. It is a case in which the Illinois judiciary has not only determined the fact of discrimination but also the amount thereof, thereby rendering valuation methodology an issue indispensable to decision. Thus were its progenitors, *Hillison* and *Kohorst*, of national importance to the rail-

road industry. See note, Map #3, Appendix B at v, *infra*. If the structure of the case at bar in these respects is not unprecedented, at least it is unusual and affords the adequate record which plenary consideration of constitutional questions deserves and sound constitutional decision requires.

At this time, history is in the process of repeating itself but in a much broader and more consequential manner than at the turn of the century. Based on allegations of underassessment of locally assessed property and discrimination against state assessed railroad property, there developed seventy or so years ago some cases in the Sixth Circuit, involving two district court decisions, 1897-1898, by Judge Clark of the federal court for the Middle District of Tennessee, and two Court of Appeals' decisions (in cases appealed from Tennessee federal district courts) by Judges Taft and Day, 1898-1901. See n. 37a at p. 71 *supra*. These four decisions all had two things in common. First, they ordered property tax relief for the railroads by way of injunction; second, it was necessary for the court to decide the amount of relief and valuation methodology was not involved.

Again, the L & N Rr. is involved in similar litigation in the Court of Appeals for the Sixth Circuit, from the Middle District of Tennessee. *L. & N. Rr. v. Pub. Service Com. of Tenn. et al.*, 249 F. Supp. 894 (M. D. Tenn. 1966), *appeal docketed,* No. 17180, 6th Cir., April 4, 1966. We set forth at A. 53-71 of the Jurisdictional Statement Judge William E. Miller's opinion which ordered injunctive relief for the L & N, without reaching measurement of railroad property level of assessment. The Sixth Circuit Court of Appeals is again to be called upon to determine the fact of discrimination and whether injunctive relief is proper. However, in 1966 that Court will be called upon by the railroad to do more—reconsider an intervening decision by this Court, *i. e., N. C. & St. L. Rr. v.*

Browning, 310 U. S. 362 (1940) (Frankfurter, J.), which Appellant discussed at 42-45 of the Jurisdictional Statement. We invite this Court's attention to the fact that the record before the Sixth Circuit Court of Appeals affords scant insight into the railroad property assessment procedures of the Tennessee administrative process. The only testimony before the district court was in the form of an 80-page transcript of a hearing before the Tennessee State Board of Equalization held on October 25, 1965. In that hearing the railroads, with delusive magnanimity, agreed not to contest that the assessments were at 100% of value (See n. 17, at 22 *supra*). The federal court record involves only the L & N's assessment for 1965-1967, a biennial one.

Fallacies underlying judicially enforced or judicially determined equalization between state-assessed property valued without regard to the inflated price level and investment, and locally assessed property valued by use of inflated "**spot**" prices, have been defined by two former tax administrators of the Illinois Department of Revenue: Lynn A. Stiles, Railroad Assessor, 1943-49, now at the Federal Reserve Bank in Chicago, and Eugene L. Maynard, Supervisor of the Chicago office of the Property Tax Division, now retired. Both economists have enjoyed a national reputation. In 1948 Stiles delivered "Equalization of Railroad Assessments" at the Fourteenth National Conference of the National Association of Assessing Officers. ASSESSMENT ADMINISTRATION: 1948; pp. 105-107 (in Library of Congress):

> "If in analyzing the local roll [,] selling price in today's market is taken as the criterion of 'full value,' then it follows that the resulting assessment ratio can be used in the debasement of central assessments **if these are the conceptual equivalents of today's real estate selling prices** . . .

"Real estate is being bought and sold in 'today's inflated market.' So also is rail investment in plant and equipment. Configurations of just such inflated prices give the pattern of today's value relationships. Granted that prices are higher now than 10 years ago or even conceding that they are higher now than they will be 10 years hence, the fact is that they establish relative values as they are at present. The job of assessment is that of establishing a set of relationships, to provide an allocation of relative liability to share in a tax. **It is submitted, therefore, that current market price should be used in arriving at the valuations to be assigned to rail investment. Current 'spot' multipliers then, as against 'period prices' or arbitrary 'normal period' prices, furnish the only proper means whereby ICC inventories—in terms of road and equipment accounts—can be translated into a realistic and meaningful assessment criterion on a parity with capitalized earnings and a present market appraisal of stock and debt.**

"If these steps can be taken, the process of central assessment will yield meaningful and **objectively defensible full valuation data. Then, by a suitable policy of equalization the results can be brought into alignment with the level of local assessments. To do otherwise** means that equalization, if such it can be termed, is achieved by infusing the process of central assessment with the perspectives and blindnesses which pervade the whole field of local assessment. That the result can yield a pattern of just and rational tax liability allocation becomes then largely a matter of chance."

Accord, Maynard, "Can the Value of State Assessed Utility Property Be Compared With the Value of Locally Assessed Property?" REVENUE ADMINISTRATION: 1955, p. 32 (published by National Association of Tax Administrators).

The key decision of this Court which applies the Fourteenth Amendment to invalidate State action based on arbitrarily disparate property tax valuation methods is *Cumberland Coal Co. v. Board,* 284 U. S. 23-25, 30-1 (1931). Appellant respectfully submits that recent pronouncements of this Court appear to suggest that the judgments of the supreme court below raise questions which deserve plenary consideration. In the opinion delivering the judgment of the Court in *Harper v. Butts,* 43 U. S. L. Week 4305, 4306-07 (U. S., Mar. 22, 1966), Mr. Justice Douglas wrote:

> "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time decreed to be the limits of fundamental rights . . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change . . .
>
> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined . . . . ." (Emphasis not added.)

We submit that even the differing emphasis articulated by Mr. Justice Black suggests that the questions presented deserve plenary consideration. He wrote, dissenting at 4307, 4308,

> "The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause **so long as these distinctions and discriminations are not 'irrational,' 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious'."**

XI. IN CONSTITUTIONAL LITIGATION THIS COURT HAS REJECTED JUDICIAL VALUE "FINDINGS" FOR RAILROAD PROPERTY BASED UPON STATE TAX ADMINISTRATORS' FIGURES BECAUSE OF INADEQUATE EVIDENTIARY SUPPORT.

The judgments of the Supreme Court of Illinois, to the extent that they rest on value "findings" for railroad property incorporating huge administrative "judgment factor" reductions, are in conflict with *Missouri Rate Cases,* 230 U. S. 474 (1913) (Hughes, J.). In that case, eighteen railroads assailed state action in the form of legislative enactments prescribing maximum freight and passenger rates after 1905 and 1907. One attack, based upon the due process clause of the Fourteenth Amendment, was that the legislation was confiscatory. The effort of the railroads was to inflate the value of their property by use of "judgment." The lower court there, as here, had invalidated the state action. There, the action invalidated was legislative; here, the action invalidated was administrative. At 497 Mr. Justice Hughes stated that the "findings of value" by the lower court were based on those made by the state assessing board for the purpose of taxation. With reasoning germane to the "judgment factors" **rejected** by the Circuit Court of Madison County below and **employed** by the Supreme Court of Illinois, Mr. Justice Hughes at 498 observed that there was no satisfactory proof of the administrators' judgment and at 499 stated:

> "On examining the evidence, however, we find it to be too general and inconclusive to be regarded as sufficient proof to sustain the values as found.
>
> Undoubtedly, the companies possessed valuable terminals, but what the values were was not suitably shown. There is an absence of evidence, appropriately specific, dealing with the lands, improvements, structures, equipment and other property owned by

each company and showing what the various items of property were worth. It would seem manifest from the character of the evidence which can be supposed to have relation to value, that reliance was principally placed upon estimates of the state assessing board. There was proof of the amount of stocks and bonds, of earnings, and also testimony as to the cost of certain recent construction, but while these matters could properly be considered in reaching a conclusion, we fail to find any adequate basis for the definite findings of value that have been made . . . . ."

At 501 with regard to valuation of CB&Q property, the Court's opinion stated,

> "Manifestly, a finding of confiscation could not be **based on such a valuation** in the absence of clear and convincing proof that the value actually existed **and that the different items of property were estimated respectively by correct methods and in accordance with proper criteria of value. This proof was lacking.**"

XII. ORDERS COMPUTING REFUNDS PURSUANT TO MANDATE OF SUPREME COURT OF ILLINOIS AS PREPARED AND SUBMITTED BY THE RAILROADS WERE ENTERED BY THE TRIAL COURT ON WEDNESDAY, APRIL 20, 1966; RAILROADS' CONTENTION THAT THE JUDGMENTS APPEALED TO THIS COURT ARE NOT FINAL LACKS SUBSTANCE.

Appellees devote their pages 2, 3, 21-23 to the contention that the judgments of the Supreme Court of Illinois appealed to this Court are not "final" within the provisions of 28 U. S. C., § 1257. The railroads' theory is that the trial court had not as of the date of their Motion entered orders computing the precise amount of the refunds ordered by the Supreme Court of Illinois; that the Appellant and the railroads had been in dispute

about details of the refund computation; that implementation of the mandate of the Supreme Court of Illinois has been delayed by controversy over whether tax "levy" or tax "extension" should be used in recomputing tax rates. The railroads represented at 3 that they had tendered refund orders and at 22 stated that if the orders were not entered by the trial court as they proposed, there may arise federal questions of due process and equal protection which might lead to further appeals to this Court. At 22 n. 13, the railroads state they have filed here nine copies of a trial court record of developments since the filing of the state supreme court mandates in the trial court. See Appendix C at vii *infra*.

On Wednesday, April 20, 1966, Appellant filed a statement with the trial court withdrawing any objection to the precise method of refund as proposed by the railroads, at the same time preserving the questions presented here. (Nine certified copies of this statement are on file with the Clerk of this Court.) On the same date the trial court entered the orders drafted and presented by the railroads. (A certified copy of each of these forty-six orders is on file with the Clerk of this Court, as are nine certified copies of the trial court's docket order relating to its action.)

These orders are the very orders tendered by the railroads to the trial court on November 30, 1965, and have since been lodged with the Clerk of the trial court. Assuming the validity of the mandate of the Supreme Court of Illinois, Appellant does not object to the precise method of refund proposed by the railroads and employed in the orders entered by the trial court.

In view of the appeal to this Court and the assertion by the railroads that the judgments appealed are not final, Appellant on April 21, 1966, filed Notices of Appeal in the trial court to the Supreme Court of Illinois from the April 20, 1966, orders, asserting only that the orders, to the extent that they implement the mandate of the

Supreme Court of Illinois issued after the entry of the judgments now appealed to this Court, violate constitutional mandates. (A prototype of these Notices of Appeal is set forth as Appendix D at ix *infra*, and nine certified copies of a prototype are on file with the Clerk of this Court.) The railroads cannot appeal from the April 20, 1966, orders because the orders give them exactly what they have demanded. These orders implement the judgments of the Supreme Court of Illinois and figure the refunds in all respects as proposed by the railroads. Appellant concedes that the only recourse is in the questions now presented to this Court. In short, Appellant's Notice of Appeal of April 21, 1966, is designed solely to preserve the questions now presented to this Court, so that in the event that this Court should conclude that the judgments now appealed to this Court are not final, further proceedings may be pursued. On April 21, 1966, Appellant also filed with the trial court Motions that the appeals of April 21, 1966, operate as supersedeas without bond. ILL. REV. STAT. c. 110, § 82 (3) (1965). On the same date the trial court entered orders granting the relief prayed, and the effect of the April 20, 1966, orders is now stayed, pending appeal to the Supreme Court of Illinois.

This Court has traditionally given the jurisdictional requirement of "finality" a practical rather than a technical construction. The opinion of this Court in *Gillespie v. U. S. Steel Corp.*, 379 U. S. 148, 152 (1964) per Mr. Justice Black stated:

> ". . . this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' Cohen v. Beneficial Industrial Loan Corp., 337 U. S. at 546. See also Brown Shoe Co. v. United States, 370 U. S. 294, 306; Bronson v. Railroad Co., 2 Black 524, 531; Forgay v. Conrad, 6 How. 201, 203. Dickenson v. Petroleum Commission Corp., 338 U. S. 507, 511, pointed out that in deciding the question of finality the most important competing

considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

In 1963 Mr. Justice White, writing for the Court, stated: "The Court has long given this provision of the statute this practical rather than a technical construction." *Construction Laborers v. Curry*, 371 U. S. 542, 549 (1963). In 1962 Mr. Chief Justice Warren, writing for the Court, mentioned "practical considerations" and that "Repetitive judicial consideration of the same question in a single suit will not occur here." *Brown Shoe Co. v. United States*, 370 U. S. 294, 309, 311 (1962). In 1952 Mr. Chief Justice Vinson, writing for the Court, concluded that for "all practical purposes" the litigation was terminated. *Pope v. Atlantic Coast Line Rr. Co.*, 345 U. S. 379, 382. In a 1948 5-4 decision, Mr. Justice Black, Mr. Justice Burton and Mr. Justice Murphy joined in the dissenting opinion of Mr. Justice Rutledge, which articulated as follows:

> "The 'penumbral' area of appealable finality, see 326 U. S. at 124, may not be sweeping in its scope. It is nevertheless one essential to prevent the letter of the section from overriding its reason. For this purpose it would seem to comprehend any situation preventing separable phases of litigation, one involving the core or crux of the controversy between the parties, the other collateral matters dependent for the necessity of their consideration and decision upon final and unqualified disposition of the hub of the dispute. If a merely mechanical application of § 237 is to be avoided, it cannot be taken that the practical approach of the WOW line of decisions must be limited exclusively to cases where an accounting is ordered to follow delivery of property decreed at the same time."

Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62, 74, 77-8, 84-5. A "practical" approach has also been imple-

mented by Mr. Chief Justice Chase in *Thompson v. Dean*, 74 U. S. (7 Wall.) 343 (1868); by Mr. Justice Davis of Illinois in *Bronson v. Railroad Co.*, 67 U. S. (2 Black) 524, 526, 528-9 (1862); by Mr. Chief Justice Taney in *Forgay et al. v. Conrad*, 47 U. S. (16 How.) 203 (1848); and by Mr. Chief Justice Marshall in *Ray v. Law*, 7 U. S. (3 Cranch) 179, 180 (1805).

In the case at bar, Appellant has no federal questions to raise other than those which are now presented to this Court. The railroads cannot have any to present below or here because of the trial court's orders of April 20, 1966. A decision by this Court that the judgments now at the bar of this Court are not final will leave Appellant with the task of processing the April 20, 1966, orders, obtaining judgments of the Supreme Court of Illinois on questions already decided by that court, and once again with the same questions and virtually the same record appealing to this Court. The questions now before this Court are the "hub" of the litigation. The issues on refund computation have already been decided by the Supreme Court of Illinois, and any minor problems which might have arisen could not, in our view, remotely have given rise to a substantial federal question.

The litigation, in some of its aspects, is already almost eight years old. Expenses are already substantial. Both Appellant and the railroads are in need of the tax money in escrow, and the rightful owners of the money have been deprived of its use for years. In *Construction Laborers v. Curry supra* this Court mentioned in finding "finality" that the party seeking review by this Court had conceded that he had no other federal claim to present. *Id.* at 551. We submit that here there is no danger of fragmentary appeals and that the analogous line of authority described as "the accounting cases" warrants a finding of "finality" under the circumstances of this case.

Appellant refers to the "Short Statement and Brief" filed by the railroads in the trial court on February 21,

1966, the very date on which the Appellant docketed this case in this Court. (The railroads have lodged a certified copy of that "Statement and Brief" with the Clerk of this Court.) At 3 the railroads **represented to the trial court** anent refund computation that "state and federal questions of the greatest importance to all parties concerned are involved in these questions. **We believe they were settled by Musso** [the case at bar]." Yet, the railroads on March 23, 1966, filed here their Motion to Dismiss or Affirm, and **represented to this Court** that the judgments entered below by the Supreme Court of Illinois on the core—the crux of the litigation, brought here by the Appellant, do **not** raise federal questions.

CONCLUSION.

For the foregoing reasons, Appellees' Motion to Dismiss or Affirm should be denied and jurisdiction noted and certiorari granted.

Respectfully submitted,

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April 23, 1966

APPENDIX A.

"Uniformity" and "Overassessment" Litigation Instituted by Railroads.

In addition to the cases cited at v-vii of the Jurisdictional Statement involving railroad complaints about property taxes are the following:

Alabama.

Pending in the Circuit Court of Montgomery County, for 1964-5 assessments:

Illinois Central v. State (2);
Seaboard Air Line Rr. v. State (2);
GM&O v. State (2);
Atlantic Coast Line v. State (2);
Birmingham So. Rr. Co. v. State;
Southern Ry. Co. v. State;
Alabama Great So. Ry. Co. v. State;
Central of Georgia v. State;
Birmingham Terminal Co. v. State;
Woodstock & Blocton Ry. v. State;
A-T. & N. R. Co. v. State;
Birmingham Belt Rr. v. State;
St. Louis and San Francisco Ry. Co. v. State;
Louisville & Nashville Rr. Co. v. State.

California.

Forty-eight separate suits were filed for the tax year 1958 by Southern Pac. Co. Later dismissed.

Florida.

Seaboard Air Line Rr. v. Gay, 745 2d 569 (1954);
Green v. Florida E. Coast Ry., 141 S. 2d 326 (1962);

Florida East Coast Rr. Co. v. Green, 178 S. 2d 355 (1965), (on appeal to Supreme Court of Florida).

Indiana.

State Board of Tax Commissioners v. C. M. St. P. & P. Rr., 96 N. E. 2d 279 (1951).

Iowa.

The C&NW is litigating state assessments of its property for 1963, 1964 and 1965 in the District Court of Polk County. Nos. 69276, 70043, 71193. State assessments of the C&NW's property (as well as other railroads in Iowa) have been held stable since 1946 and indeed since 1959 have been progressively lower. Letters from Ballard B. Tipton, Director, Property Tax Division, Iowa State Tax Commission to Burton C. Bernard, March 21, 25, 1966 (assessments for all railroads 1946-1965 enclosed). There have been "judgment factor" reductions in Iowa's assessments of railroad property. C&NW v. State Tax Com., 137 N. W. 2d 246 (1965).

Michigan.

C&NW v. Dept. of Rev., Civil No. 5148, W. D. Mich. (pending).

Missouri.

Norfolk & Western Ry. Co. v. State Tax Com., Circuit Court, Cole County (on appeal to Supreme Court of Missouri).

New Jersey.

Declaratory judgment actions pending in the Superior Court of New Jersey involving 1966 assessments:

Lehigh Valley Rr. Co. v. Kingsley, et al.;
Erie Lackawanna Rr. Co. v. Kingsley, et al.;

New York Central Rr. Co. v. Kingsley, et al.;
Pennsylvania Rr. Co. v. Kingsley, et al;

Pending appeals to the State Division of Tax Appeals:

167 railroad appeals for years 1953-1965 which have not yet reached the trial calendar;
Del., Lackawanna & Western Rr. Co. v. Director, 23 N. J. 561 (1957);
Lehigh Valley Rr. Co. v. Director, 26 N. J. 173 (1957);
Lehigh Valley Rr. Co. v. Director, 26 N. J. 188 (1957).

New York.

New York Central Rr. v. Assessors of the City of Buffalo, Supreme Court for Erie County. Separate suits filed for each year 1955 through 1965. Some have lapsed. Others settled. Case for 1965 pending.

Oregon.

U. Pac. Rr. v. Hoefke, 376 P. 2d 80 (1962).

South Dakota.

C&NW v. State, Circuit Court, Lincoln County (tax year 1963), on appeal to the Supreme Court of South Dakota.

Tennessee.

L & N Rr. v. Public Service Com. of Tennessee and State Board of Equalization, 249 F. Supp. 394 (M. D. Tenn. 1966), *appeal docketed,* No. 17180, 6th Cir., April 4, 1966;
Southern Rr. v. Clement et al., Chancery Court, Davidson County (tax years 1964, 1965) (on

appeal to the Supreme Court of Tennessee) (1966);

Southern Rr. Co. v. Clement, et al., Chancery Court, Davidson County (tax year 1965).

Virginia.

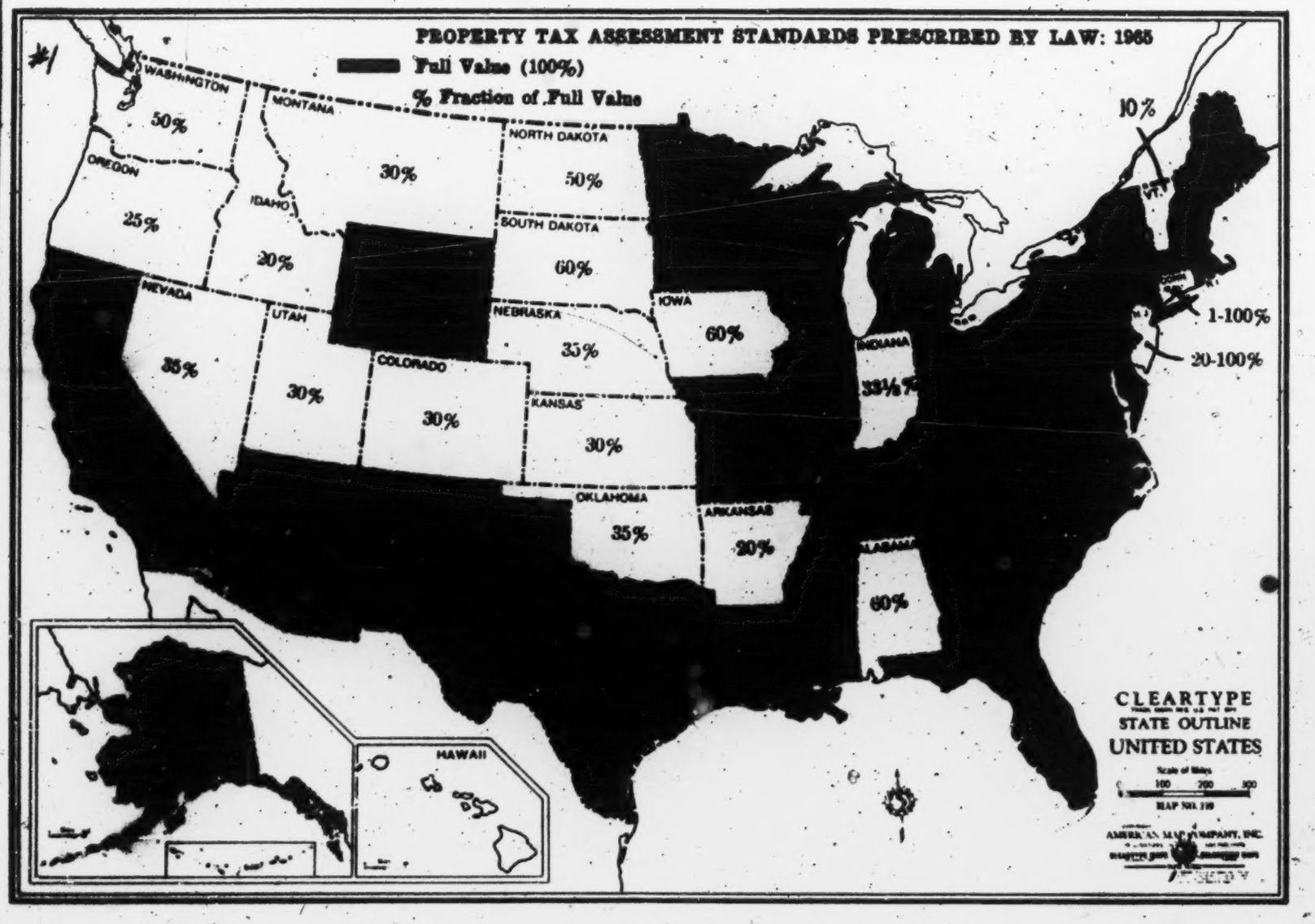
Richmond, Fredericksburg and Potomac Rr. v. Va., 124 S. E. 2d 206 (1962).

Wyoming.

CB&Q Rr. v. Bruch, District Court, Laramie County (pending) (tax years 1964-5).

See Appendix B at v *infra*.

APPENDIX B.



MAP #1

Source: Shannon, "Conflict Between State Assessment Law and Local Assessment Practice," a Paper delivered in June 1965 before the Conference on Property Taxation U. S. A. at Milwaukee. (Dr. Shannon is Senior Analyst, Advisory Commission on Intergovernmental Relations, Washington, D. C.) At least six states changed from a full value standard to a fractional value standard 1956-1965: Colorado, Idaho, Indiana, Kansas, Nevada and New Jersey. In Vermont and Connecticut each local assessor determines the standard for his assessment district. In Hawaii the State Director of Taxation determines the standard.

"Assessment" responsibility is divided between local assessors and state tax administrators according to type of property. Most property is locally assessed. In addition to assessment responsibilities, most state tax administrators also have duties involving inter-county "equalization" of locally assessed property on county-wide bases at the legal standard of assessment. "Level of assessment" of property is the ratio, expressed in percentage, of assessment of property, before or after state equalization, related to the value of that property. The "assessment" of property is a fixed administratively determined figure. It is impossible to derive a "level of assessment" for property without a preliminary determination of the "value" of the property to which the "assessment" figure can be related. Generally post-World War II inflation has caused the "level of assessment" of real estate to decrease to levels far below the legal requirements as "assessments" of real property even after state equalization have failed to keep pace with the inflating price level.

MAP #2

Source: U. S. Bureau of the Census, II Census of Governments: 1962, Taxable Property Valuations 3-4, Tables 2, 25. In 1961, state assessments of railroad property totalled $6,427,000,000. The total state assessment in green colored states was $5,939,000,000. *Id.* at 28-29, 158-60. Illinois, the leading "terminal" state, contained the largest state assessment of railroad property, with Ohio ranking second. Data unavailable for New York and Massachusetts. For the decreasing assessments, see n. 23 *supra*. Most states are "bridge" states, with comparatively little terminal facilities. Bureau of Census data issued in 1957 and 1962 do not include value determinations for railroad property and therefore do not reflect estimated "levels of assessment" for railroad property. However, utilizing its "assessment—sales" ratio determinations based upon sample studies of inflated sales prices related to assessments the Bureau of the Census presented estimated "levels of assessment" for locally assessed real estate. See n. 27 *supra*.

MAP #3

Source: Submission in June 1960 of the American Association of Railroads (AAR) to "Special Study Group on Transportation Policies in the United States" organized pursuant to S. Res. 29, 86th Cong., 1st Sess. (1959). The submission was prepared by a "subcommittee of the Law Committee" of the Association and was also sent to General Counsel of each member railroad in June 1960.

The numbers on the map represent the property tax dollars in millions claimed by the American Association of Railroads in its submission to be the result of unconstitutional discrimination worked against the property of its members for 1957. The total alleged discrimination for 1957 amounted to $141,187,829 or 54% of the ad valorem taxes paid by the railroads in the 31 states listed.

The submission of the Association is based upon an inarticulated premise. The submission does not describe the method by which the value of railroad property was determined or state the values. However, the submission does state that the value of non-railroad property was based upon findings published by the Bureau of the Census in 1957. The levels of assessment estimated by the Bureau of the Census were based upon sales of real estate during a six month period in 1956. Thus the Association figured the value of non-railroad property based upon inflated "spot" sales prices. The submission consisted of five columns of figures for each of 31 states. Column 1 presents "railroad ad valorem taxes" totaling $261,061,831. Column 2 presents "all other railroad taxes" totaling $47,608,400. Column 3 presents "percentage of value at which railroad property assessed." (The lower the value of the property the higher the "percentage" or "level

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Data Corroborative of Property Tax Discrimination Against the People Resulting From Judicially Enforced Equalization Between Locally Assessed Property and State Assessed Railroad Property Based on Valuation of Locally Assessed Property Tied to Inflated Prices and Unit Valuation of State-Assessed Railroad Property Which Eliminates the Influence of Inflated Prices and Increased Investment.

ESTIMATED NATIONAL LEVELS OF ASSESSMENT FOR LOCALLY ASSESSED REAL PROPERTY AND RAILROAD PROPERTY: 1961-2.

(Billions)

(1) Year	(2) Property	(3) Assessed Value	(4) Value	(5) Ratio, (3÷4)
1961	Locally Assessed Real Property	282[a]	970[a]	29%[a]
1961	Railroad Property	7[e]		
1962	Railroad Property		24[e]	29%[f]

[a] U. S. Bureau of the Census, II Census of Governments: 1962, Taxable Property Values 25.

[b] Imputed by Bureau of Census from "sales-assessment" ratios developed on sampling basis for real properties which changed hands during a 6-month period in 1961. *Id.* at 25, 1. "Spot" pricing used.

[c] "The assessment practice in most of the states bears little resemblance to the legal requirements . . . Deep underassessment on virtually a nationwide basis was disclosed by the Census Bureau's assessment-sales ratio study for the '1957 Census of Governments'" I The Role of the States in Strengthening the Property Tax 43 (1963) (Advisory Commission on Intergovernmental Relations)

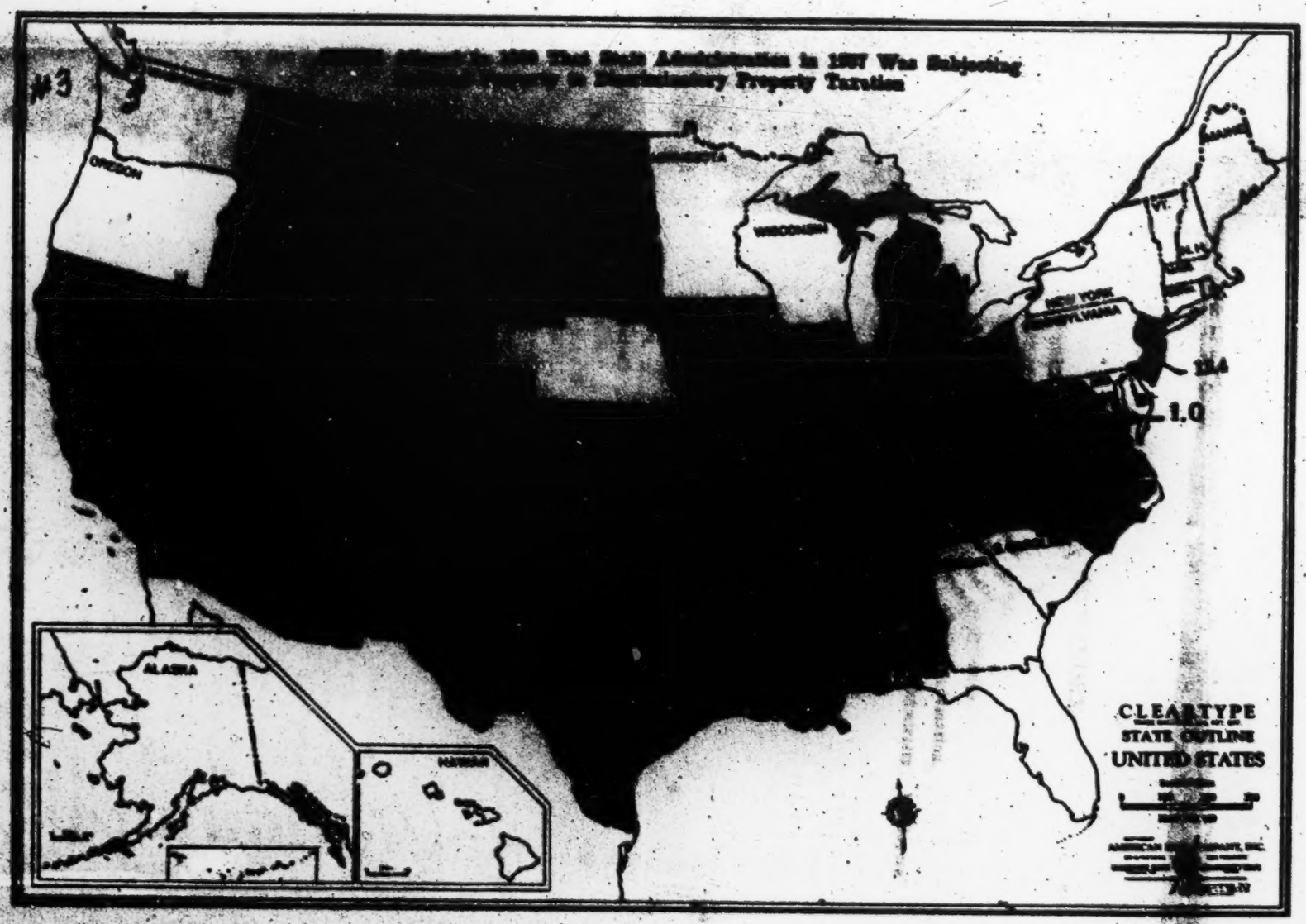
[d] Census of Governments: 1962, Taxable Property Values 28-29, 156-160 (Tables 2, 25). State-assessed railroad property assessments totaled $6,427,000,000. The People have increased the figure to $7,000,000,000 to allow for an estimate of assessed values of locally assessed railroad property. The Bureau of Census has no data back of 1956. In 1934, its Census of Wealth, Debt & Taxation lumped railroad and public utility property assessments under the heading, "Other Property." In 1940 the total railroad property assessment was also about 7 billion. See Separate Statement of C. E. Childe, one of a two member Board On Carrier Taxation, H. Doc. 160 at 8-9, 79th Cong., 1st Sess. (1944).

[e] This figure is the yearend 1962 original cost new of property inventoried by the Interstate Commerce Commission and carried on the books of the ICC, as distinguished from the higher original cost carried on the books of carriers which have not gone through reorganization, reduced by accumulated depreciation and amortization. Elements of Value of Property Used in Common-Carrier Service as of December 31, 1962, Class I Line Haul Railways (I. C. C.); Transport Statistics in the United States: 1962, p. 112, Table 158 (ICC). This figure does not include an estimated 2.4 billion of depreciated non-Class I Line Haul railroad property. This figure does include railroad property in Connecticut, Maine, Minnesota, New York and Pennsylvania where railroad property is either exempt or locally assessed. It is assumed that the original cost depreciated of these two categories of property offset each other. The figure does not reflect application of ICC "period" price indexes used to produce the ICC's 1962 reproduction cost new-less-depreciation of approximately 45 billion; whereas, the estimated value by the Bureau of Census of locally assessed real estate is imputed from assessment-sales ratios reflecting inflated "spot" prices of 1961.

[f] "No study of the relation between assessed value and market worth has been attempted for state-assessed property. . . ." II Census of Governments: 1962, Taxable Property Values 9.

U. S. RAILROAD PROPERTY FACTS.

1. Capital Expenditure 1946-1965 . . . . . $22,000,000,000 (note 21 *supra*)



based upon inflated "spot" sales prices. The submission consisted of five columns of figures for each of 31 states. Column 1 presents "railroad ad valorem taxes" totaling $261,061,831. Column 2 presents "all other railroad taxes" totaling $47,808,400. Column 3 presents "percentage of value at which railroad property assessed." (The lower the value of the property the higher the "percentage" or "level of assessment.") Column 4 presents "percentage of value at which property of others assessed." (The higher the value of the property the lower the "percentage" or "level of assessment.") Column 5 presents "estimated reduction in railroad ad valorem taxes if railroad assessments had been made at the same percentage of value as the assessment of property of others" totaling $141,187,830. For Illinois, the AAR submission of June 1960 represented railroad ad valorem taxes for 1957 were $24,000,000; railroad property was alleged to have been assessed at 100%, while the level of assessment of other people's property was stated as 49.97%, producing alleged unconstitutional discrimination in 1957 amounting to $12,000,000.

On September 6, 1960, James N. Ogden, Esq., of Mobile, Alabama, Vice-President and General Counsel of GM&O, Mobile & Ohio RR. and member of the "Law Committee of the American Association of Railroads," without mention that the data had been previously transmitted to the Senate Study Group which was not holding public hearings, revealed that "Column 3" data described above "shows the percent of value at which property is assessed in the several states. This is, of course, a judgment figure and, as indicated heretofore, was carefully checked by at least two responsible railroad tax officers for each state. In all instances where there was a choice, the lowest ratio was used." Proceedings, National Tax Association 378, 385 (1960). On October 10, 1960, the People of Illinois filed in the Supreme Court of Illinois a record on appeal from a uniformity judgment entered in Lee County, Illinois in favor of CB&Q for tax year 1956. On October 28, 1960, GM&O and the largest single holder of its stock, C&NW, filed in the Supreme Court of Illinois records on appeal from two uniformity judgments entered by a Sangamon County trial court in favor of the People for tax year 1957. The GM&O and C&NW appeals were consolidated on November 1, 1960. On December 20, 1960 the brief for the C&NW and GM&O was filed, naming James N. Ogden, Esq., of counsel.

On December 29, 1960, the Senate Special Study Group transmitted its Report as a "Committee Print" to the Committee on Commerce of the United States Senate. This "Preliminary Draft" at 486-7 contained the above described table of data submitted by the AAR in June 1960 and quoted the conclusion of the AAR's submission, but nothing was said about the underlying valuation method for railroad property employed by the AAR. On March 29, 1961, the Supreme Court of Illinois filed its opinions in *People ex rel. Hillison v. CB&Q*, and *People ex rel. Kohorst v. GM&O and C&NW*, 22 Ill. 2d 88, 104 (1961), holding on inadequate records that the property of the three railroads, including by far the two largest in Illinois, had been in 1957 state-assessed at 100% of value. On May 17, 1961, the Supreme Court of Illinois denied petitions for rehearing in *Hillison* and *Kohorst*. On June 26, 1961, the "Preliminary Draft" of the Special Study Group was ordered reprinted without alteration as "*Report of the Committee on Commerce United States Senate by Its Special Study Group on Transportation Policies in the United States (Pursuant to S. Res. 29,151 and 244 of the 85th Congress)*," was so reprinted and numbered Sen. Report. No. 445, 87th Cong., 1st Sess.

The Special Study Group was an outgrowth of extensive hearings conducted in January, 1956 before the Subcommittee on Surface Transportation of the Senate Committee on Commerce. The hearings, entitled *Problems of Railroads*, produced four volumes of testimony. Volume 1 covered the testimony of railroads and it does not include remonstrance about alleged discriminatory property taxes. *Hearings*, 85th Cong., 2nd Sess. (Part 1). The hearings led to enactment of the Transportation Act of 1958. See Sen. Rep. No. 1647, Cal. No. 1678, 85th Cong., 2nd Sess. The subcommittee recommended a special study on long range policy matters but it said nothing about property taxes while recommending other specific subjects of inquiry. *Id.* at 26.

On March 22, 1965, James N. Ogden, Esq., still General Counsel and Vice-President of GM&O (and also AAR spokesman) entered his appearance before this Court in this case.

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On September 8, 1960, James H. Ogden, Esq., of Mobile, Alabama, Vice-President and General Counsel of Gulf, Mobile & Ohio Rr. and member of the "Law Committee of the American Association of Railroads," without mention that the data had been previously transmitted to the Senate Study Group which was not holding public hearings, revealed that "Column 3" data described above "shows the percent of value at which property is assessed in the several states. This is, of course, a judgment figure and, as indicated hereinbefore, was carefully checked by at least two responsible railroad tax officers for each state. In all instances where there was a choice, the lowest ratio was used." Proceedings, National Tax Association 376, 386 (1960). On October 10, 1960, the People of Illinois filed in the Supreme Court of Illinois a record on appeal from a uniformity judgment entered in Lee County, Illinois in favor of CB&Q for tax year 1956. On October 20, 1960, GM&O and the largest single holder of its stock, C&NW, filed in the Supreme Court of Illinois records on appeal from two uniformity judgments entered by a Sangamon County trial court in favor of the People for tax year 1957. The GM&O and C&NW appeals were consolidated on November 1, 1960. On December 20, 1960 the brief for the C&NW and GM&O was filed, naming James H. Ogden, Esq., of counsel.

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U. S. RAILROAD PROPERTY FACTS.

1. Capital Expenditure 1946-1965.....$22,000,000,000 (note 21 *supra*)
2. Capital Expenditure 1956-1960.....$ 5,600,000,000 (note 21 *supra*)
3. "Total" investment in "road" and "equipment" property owned by Class I Line Haul Carriers at 12/31/62 (original cost new before depreciation and amortization)....$32,863,427,000 (ICC) (note 21 *supra*)

U. S. RAILROAD PROPERTY TAX FACTS.

1. State Assessments of Railroad Property Decreasing 1956-1964[a]
2. Ad Valorem Taxes Down 23%, 1957-1964, from $353,000,000 to $275,000,000 (AAR)

[a] See note 22 *supra*.

PROPERTY TAX COLLECTIONS IN THE UNITED STATES.[a]

(Billions)

1946.....	4,196	1956.....	14,047
1948.....	6,126	1959.....	14,963
1950.....	7,349	1960.....	15,695
1952.....	8,653	1961.....	16,692
1953.....	975	1962.....	19,064
1954.....	67	1963.....	20,904
1955.....	10,735	1964.....	22,360
1956.....	11,749	1965.....	23,876
1957.....	12,892		

[a] 1946-1962: IV Census of Governments: 1962, Historical Statistics on Government Finances and Employment 38, 39 (fiscal years); 1963-65: Bureau of Census: Quarterly Summary of State & Local Tax Revenues 3 (Oct.-Dec., 1965) (calendar years).

INFLATION.

PRICE AND COST INDICES REFLECTING THE INFLATION WHICH ILLINOIS' DIRECTORS OF REVENUE IGNORED AFTER 1948 BOTH IN EQUALIZING LOCALLY ASSESSED PROPERTY AND IN ASSESSING RAILROAD PROPERTY:

Year	Construction Index[a]	Residences[b]	Commercial & Factory Buildings[b]	Railroad Construction[c]
1946	45.5	37.4	58.	232
1947	54.4	69.5	62.2	258
1948	60.6	78.2	70.3	283
1949	62.7	76.2	71.1	284
1950	67.1	80.3	74.0	288
1951	71.4	86.6	79.9	306
1952	74.9	88.8	82.7	315
1953	78.9	90.4	85.6	326
1954	82.6	89.7	86.6	328
1955	86.8	92.4	89.5	336
1956	91.1	96.5	94.1	362
1957	95.2	98.3	97.5	381
1958	99.9	99.2	99.5	390
1959	104.9	102.5	103.0	398
1960	108.3	104.2	104.7	399
1961	111.5	104.5	105.6	397
1962	114.7	106.3	107.8	396

[a] Engineering News-Record, McGraw Hill Pub. Co. Indices contain 3 material components and 1 labor component.

[b] Frame and Brick Houses. Indices contain components for materials, labor and certain taxes. E. H. Boeckh and Associates, Washington, D. C., reported in Construction Statistics 1915-1964, A Supplement to Construction Review, U. S. Dept. of Commerce (Jan., 1965).

[c] Price Indexes, ICC (Railway Accounts), Pet. Ex. 70. III Exhibits. Based on "period" not "spot" prices.

APPENDIX B.

APPENDIX C.

Post-Mandate Developments in the Trial Court to and Including Friday, April 22, 1966:*

1. September 30, 1965: Petition for Rehearing denied by the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 217.

2. September 30, 1965: Judgments entered and mandates issued by the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 172-217.

3. October 1, 1965: Mandates of Supreme Court of Illinois filed in trial court.

4. November 2, 1965: Trial court redocketed the cases and Appellees moved for refund orders. Appellees' Motion for entry of orders reset for November 30, 1965.

5. November 30, 1965: Railroads presented 46 refund orders, with tabulations, causing many of the orders to be file marked without trial court's signature. Appellant given time to examine data; matter reset to January 8, 1966.

6. December 2, 1965: Appellant's response to refund orders reset to January 7, 1966.

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* Based on certified papers filed by Appellees with the Clerk of this Court as stated at 22 n. 13 of Appellees' Motion covering the period October 1, 1965-March 21, 1966. Appellant has filed certified papers covering the period March 21, 1966, to April 22, 1966. The railroads have interspersed the certified papers filed by them with the Clerk with many documents irrelevant to the finality issue. The documents not pertinent to the finality issue are in the record. We invite the Court's attention to the fact that the "Motion" of the railroads filed January 4, 1966, in the trial court, not related to finality, was involved in proceedings, a full transcript of which is at III Ill. Sup. Ct. 718-752. Furthermore, the certified trial court documents filed by the railroads purport to include Peo. Ex. 70. In fact, only the first few pages of that exhibit have been filed. The entire exhibit is in III Exhibits.

7. January 11, 1966: Appellant granted continuance due to hospitalization of State's Attorney. Reset to February 10, 1966.

8. February 21, 1966: Railroads filed "short Statement and Brief" Supporting the Method of Refund Utilized by them in drafting the Orders presented on November 30, 1965.

9. March 21, 1966: Railroads obtained certified copy of trial court proceedings.

10. March 23, 1966: Railroads filed Motion to Dismiss or Affirm in this Court together with certified trial court proceedings.

11. April 20, 1966: Trial court entered orders presented by railroads on November 30, 1965.

12. April 21, 1966: Appellant filed Notices of Appeal to Supreme Court of Illinois from April 20, 1966, orders entered by trial court solely to preserve questions presented to this Court in the Jurisdictional Statement. Trial Court entered orders staying the April 20, 1966 orders.

APPENDIX D.

Prototype of 46 Notices of Appeal to the Supreme Court of Illinois filed by Appellant on April 21, 1966, from 46 Orders entered by the Trial Court, on April 20, 1966, raising the same questions now presented by Appellant to this Court.

Appeal to the Supreme Court of Illinois From the Third Judicial Circuit, Madison County, Illinois.

In the Matter of the Application of the People of the State of Illinois ex rel George Musso, Treasurer and Ex Officio Collector of Taxes of Madison County, Illinois, Applicant-Appellant, vs. Chicago, Burlington & Quincy Railroad Co., Objector-Appellee.	1957 Tax Objection.

Notice of Appeal.

Appeal is hereby taken to the Supreme Court of Illinois from the parts of the Order of the Circuit Court entered on April 20, 1966, which utilize or rely on the determination that the state assessment of railroad operating property is equal to 100% of fair cash value. Those parts of the Order which so rely are findings numbered 2, 3, 4, 5, 6, 7, 8, 9, and ordering paragraphs numbered 1, 2, 3, 4, 5, and attached tabulations.

Appellant contends that the mandate and the judgment of the Supreme Court upon which the mandate is based are violative of Article IX, Sec. I of the Illinois Constitution and the due process and equal protection clauses of

the Fourteenth Amendment to the United States Constitution for the reasons set forth in the Jurisdictional Statement filed in the United States Supreme Court on February 21, 1966, in No. 1046 on the Appellate Docket for the October 1965 Term.

Appellant desires that the Supreme Court of Illinois reverse and set aside the order of April 20, 1966, and direct the trial court to enter an order of refund in all respects identical to the April 20, 1966, order except that the order shall utilize the trial court's August 20, 1964, determination of the level of assessment of the railroad's operating property.

Appellant files this Notice of Appeal pursuant to Ill. Rev. Stat. 1965, C. 110, 101.33.

Joseph R. Bartylak (s)
Joseph R. Bartylak, State's Attorney,
Attorney for Appellant,
Court House,
Edwardsville, Illinois.

Of Counsel:
Burton C. Bernard,
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